The Central Law Journal.

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CURRENT TOPICS.

PARTY politics in New Hampshire appear to have reached as shameless a pitch as in Louisiana. Even the judicial officers of the State are knocked about at shuttlecock and battledoor, between the two contending parties, with as little decency as the gravedigger displayed for Yorick's skull. The constitution of that State, as we understand it, provides that judicial officers shall hold their office during good behavior; but that the governor, with the consent of the council, may remove them upon an address passed by both houses of the legislature. The last Republican legislature has, as we learn through the Chicago Legal News, passed an address for the removal of every Democratic judge in the state, and also the reporter, John M. Shirley, Esq. The chairman of the Republican central committee has been appointed reporter in Mr. Shirley's place. Shameless as this proceeding is, we understand that it is simply a repetition of what a Democratic legislature did, though, we believe, in a different manner, when it came into power some three years ago. If we were to judge from such signs as these, we should conclude that American politics have reached a low ebb. It is but a single step to the Mexican system.

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IN our issue of Jan. 12, we published the opinion of the St. Louis Court of Appeals in the case of *The Life Association of America v. Boogher*, in which the court decided that courts of equity have no power to enjoin the publication of a threatened libel, though its publisher is insolvent, and the damage, therefore, irreparable. The court, in delivering this opinion, said: "No case is cited by the learned counsel for appellant in which the jurisdiction here claimed has been exercised. All that they venture to suggest is, that the various English courts which have refused to exercise such a jurisdiction have placed their refusal on grounds which do not make such refusal certainly apposite to the circumstances shown by this petition. The refusal has been uniform." This, we think, is not quite correct. In Dixon v. Holden, L. R. 7 Eq. 494, the plaintiff had been informed that a notice would be published, in which he was alluded to as being a solvent partner in an insolvent firm, of which he was not, in fact, a partner at all. On the application of the plaintiff, an injunction was ordered by Sir R. Malins against the publication of the notice. The Vice Chancelor said: "In the decision I arrive at, I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property—whether it consists of money or reputation." In Rollins v. Hinks, L. R. 13 Eq. 355, the doctrine thus announced was adhered to. In that case the owners of an English patent to a certain kind of lamp made a publication in which they referred to an American patent as being an infringement of their right. The owner of the American invention demanded that a suit should be brought to try the question of the infringement; but this was refused. On application, an injunction was issued to prevent the publication of the advertisement.

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THE communication which we print elsewhere, under the title of "Railroad-Wrecking," contains much, without doubt, that is just and reasonable. We know nothing of the particular facts charged by our correspondent; but we print his communication in pursuance of a determination, which we have always maintained in the conduct of this journal, of giving every person a fair hearing when writing about matters of general interest to the profession. In discussing this particular subject, care should be taken lest the just indignation of an honest mind betray one into assertions too strong and too sweeping in their scope. Of all the men who fail in business and go through bankruptcy, we doubt whether there is one out of a thousand who does not, in the midst of his embarrassments, commit some act of legal or moral wrong. Corporations are not what the subtlety of legal writers declares them to be, intangible entities, but they are aggregations of men; and what is true of insolvent individuals, is equally true of insolvent corporations. But, because the great majority of bankrupts commit acts of fraud against their creditors, it would not be just to condemn every bankrupt as a wrong-doer, and as deserving of the penitentiary. What we said in the editorial alluded to was intended to be general in its application, and, at the time it was written, we did not have any particular case in mind. While we have not a disposition to recall a single word of that editorial, it is but just that we should state our conviction that cases of railroad insolvency frequently do arise which are not deserving of the animadversions of ourselves or our correspondent. Two great railroads, the Atlantic and Pacific Railroad, and the Pacific Railroad of Missouri, passed under the auctioneer's hammer in St. Louis during the past year. These railroads, for more than a year, were operated by receivers appointed by the Circuit Court of the United States for the Eastern District of Missouri. We are well warranted in saying that these receivers have discharged their trust to the satisfaction of the court, of the parties in interest and of the public. There has been a

remarkable freedom from accidents injurious to life and property, and very few complaints have been made of acts of oppression. The bondholders displayed a disposition to recognize the rights of general creditors, which was praiseworthy in the highest degree; so that more than half a million dollars of money belonging to the bondholders has been disbursed to general contract creditors, for which, except in some instances of statutory liens, the bondholders were not liable. The court, itself, has displayed an equal disposition to regard the rights of general creditors; and, on the very day this article is written, an order is entered for the payment of some six thousand dollars to attorneys of the insolvent and defunct corporation, for services performed entirely in and about the business of the corporation, and which in no way concerned the interests of the bondholders. Instances like these afford a grateful contrast to the general infamy—an infamy which only finds expression in the new word which is knocking at the door of lexicographers for admission—"railroad-wrecking."

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TO FACILITATE the business of the Supreme Court of Missouri, it is proposed by some to add wings to the capitol and a wing to the court, in the shape of a commission of appeals. We do not think the court is in need of wings. Side-shows may be an important adjunct to a first-class circus; but in our opinion they are not desirable accompaniments of a Supreme Court. And there is not room for two Supreme Courts in one State. That the Supreme Judges should be speedily liberated from the gloomy and unwholesome cells which they now occupy, all seem to agree. The average prisoner in the St. Louis county jail enjoys a more comfortable cell than those provided for the judges of the Supreme Court. The library-room barely affords room for the books, leaving very little space, and no conveniences, for the members of the bar in preparing their cases. Something needs to be done at once. It seems to us that it would be a waste of public money to attempt to provide the necessary room by adding wings to that dilapidated old rookery where members of the legislature wrestle with the fiends of foul air and influenza. The capitol is so unalterably seedy, and presents from every point of view, both exterior and interior, such an air of faded, cheap gentility, that an addition of a better order would inevitably aggravate, by contrast, the present prevailing shabbiness; and, in addition to that, the extensions of the building proposed would be very costly in proportion to the amount of room obtained. It seems to us that it would be better to erect a separate building on the capitol grounds, for the accommodation of the Supreme Court and the State Library. Such a building ought not to cost more than twenty thousand dollars, while the other plan would involve an expense of probably not less than one hundred thousand dollars. In fact, when such improvements are once commenced, it is very hard to tell when they will end. As to the other wing—that which it is proposed to wax on to the Supreme Court, we are of the opinion that it would be a superfluous and costly elephant, if it is permissible to call a wing an elephant under any circumstances. The court is now behind the docket some seven hundred cases. Instead of growing larger, the docket is decreasing, and we think, if the court were relieved of some very unnecessary burdens, it would be able to dispose of all the cases on the docket within two years. We have heretofore referred to the unsatisfactory character of the records sent from the lower courts. If this evil were remedied, and the case made, together with the brief of counsel, were required to be printed, it would lighten the labor of the court at least one-third, and perhaps more. In addition to this, the law requiring the judges to state the facts of the case in their opinions, should be repealed, and that work assigned to the reporter. This would add greatly to the compactness and symmetry of the opinions, and do away with the main cause for the prolixity now so much complained of. Instead of devoting his time to loading down his opinion with a statement of the facts of the case, the judge delivering the opinion should be required to write the syllabus. He would be better qualified to guess at the meaning of his opinion than the reporter. At least, he would have a clearer conception of what he intended to hold. The adoption of a constitutional amendment authorizing a commission of appeals, together with the expenses that would necessarily be incurred by the commission, would pay for the printing of a great many records and briefs.

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THE joint committee of the two houses of congress, to whom was referred the subject of counting the electoral votes for President and Vice-President, have reported a plan, in the nature of a compromise, which will, we think, commend itself favorably to the minds of all patriotic citizens, irrespective of party. It is, in brief, as follows: If more than one return, or paper purporting to be a return, from a state shall have been received by the president of the Senate, all such returns shall be opened by him in the presence of both houses, and, after being read by the tellers, shall thereupon be submitted to the judgment and decision, as to which is the true and legal electoral vote, of a commission created under the bill. The decision of this tribunal shall be final, unless reversed by a concurrent vote of both houses. The commission shall be composed of five members of the House of Representatives, five members of the Senate, and five members of the Supreme Court of the United States, viz: Justices Clifford, Miller, Field and Strong, and a fifth justice of that court, to be chosen by the four appointed under the provisions of the bill. The sixth section of the act provides that nothing therein provided shall be held to impair or affect any right now existing under the constitution and laws, to question, by proceedings in the courts of the United States, the right or title of the person who shall be declared elected, or who shall claim to be President

or Vice-President of the United States. While we do not believe this plan can be defended on strictly constitutional grounds, yet it would seem that some such arrangement will be absolutely necessary, in order to avert a real Mexican imbroglio. The tranquillity of the country is of infinitely more importance than the success of any candidate or of any party. If a candidate for the presidency were clearly elected in the manner prescribed by the constitution, to defraud him of his office would inflict a deep wound upon our institutions. But such a wound would bear no comparison to the calamity of a civil war. The misfortune of such a war would be, that it could afford no remedy for the evil which provoked it, but, on the contrary, would inevitably result, as such wars in republics always do, in the establishment of an usurped government, and in the destruction of popular institutions. This would be true, no matter which party might succeed. Nothing can justify a resort to the sword between citizens of the same state but a long train of evils, unbearable in their nature, and incapable of redress in any other mode. No such evils exist at this time, nor are they likely to arise in our day; and if any man talks of war now, his lips drop treason, and he deserves to be shunned and abhorred as a traitor.

OBJECTIONS to the proposed compromise have been urged, on the ground that, to make five of the judges of the Supreme Court members of a political commission of this character, would tend to destroy public confidence in the integrity of the judiciary by dragging the judges into the arena of party politics. This objection is, without doubt, a cogent one. Popular confidence in the judiciary has been, of late years, greatly shaken by the frequency with which the judicial tribunals have been appealed to, to decide contested elections and other questions political in their character. A federal district judge in Louisiana destroyed forever his reputation, and was forced to resign his office, by suppressing a state government by means of an injunction issued in the night-time. We have no doubt whatever that, in doing this, Judge Durell thought he was acting right in a great emergency. We understand that he was a man of great learning, and blameless in his professional and private life. In discharging, upon *habeas corpus*, the members of the South Carolina returning board, who had been committed to jail for contempt by the Supreme Court of that state, Judge Bond, of the United States Circuit Court, has brought upon himself severe criticism. We can not undertake to express any opinion upon the merits of that criticism; but it is clear that such a conflict between the federal and state judiciary is unfortunate in the last degree. The emergency, however, which calls upon five of the justices of the Supreme Court of the United States to take part in the settlement of a difficulty, which has never before arisen in our history, and which may never again arise, is so transcendent as to overshadow all considerations of this character. The presence of these judges will allay party strife, and dispose the people to acquiesce in the decision of the tribunal in whose deliberations they are called upon to take part, no matter what that decision may be. In our judgment, no such duty or responsibility was ever imposed upon five judges before. If they act as technical lawyers, and take narrow views of the situation, they will, undoubtly, hold the creation of the proposed tribunal unconstitutional, and will refuse to act at all. If they act as befits them as patriots in a great emergency, they may hereafter have the satisfaction of knowing that they were instrumental in staying an outburst of civil war, and a possible wreck of free institutions.

SUICIDE—LIFE INSURANCE AND PUBLIC POLICY.

In the policies of life insurance in ordinary use in America, a provision is common, excepting from their operation cases of the death of the insured in the known violation of law. Is a policy which contains such a clause, but which does not contain the ordinary suicide clause, avoided by the felonious suicide of the insured? We say felonious suicide, because the case of the Life Ins. Co. v. Terry, 15 Wall. 580, and other cases, carrying probably the weight of authority, have taken the distinction that it is only deliberate and conscious suicide, such as amounts to felony, that can, in law, be said to be the act of the party; so that suicide, committed in a state of complete and positive insanity, is not within the meaning of the ordinary suicide clause. The question propounded has never, we believe, been presented to the courts for judicial determination. All the American cases in which the clause "in violation of law" has been construed, have been cases where the death of the insured has becu caused by the act of another. The precise question may, however, yet arise in the practice of the courts, as it does occasionally in the settlement of life insurance claims, inasmuch as some policies still contain only the general limitation we have mentioned, without any reference to suicide in terms, and though, as shown in a case reported in our last issue, the suicide clause is very generally adopted in the forms of policies, and has been so extended in many instances as to cover all cases of suicide, even non-felonious; still the general question of death in violation of law, not by suicide proper, may arise under these modern policies. An instance of this is found in the case of Hatch v. Mut. Life Ins. Co., reported elsewhere in this issue. The violation of law there did not amount to a technical suicide, though it was an intentional and felonious violation, which resulted in the death of the insured. The question in that form might arise under a policy containing the broadest suicide clause, only to be determined under the other and more general clause, or under general principles of law.

The principle of the decision in the Hatch case, to-wit: that death, necessarily resulting from any felonious act, would effectually avoid a policy

of life insurance, is broad enough to cover all cases of suicide into which the element of insanity does not enter. That principle is this, that no insurer will be allowed to offer specific indemnity against the result of any felony, because to do so would be contrary to public policy; consequently, no such act can be construed to fall within the purview of any general contract of life insurance. This rule, it will be seen, is broader than any clause of the policy, and depends upon no special clause. Indeed, it does not appear in the report of the case that either of the clauses mentioned was contained in the policy in the Hatch case. The same remark applies to two of the cases cited by the Massachusetts court in that case as authority.

In Fauntleroy's case (Amicable Soc. v. Bolland, 4 Bligh, 194), the death was in execution of the sentence of a court for felony, This, it was held, avoided the contract, upon principles of public policy; as it would not be tolerated for a moment that any insurer should undertake to insure against death so resulting. To agree to pay indemnity in money in such a case would stimulate crime. In Horn v. Anglo-Australian L. I. Co. 7 Jur. N. S. 673, 2 Big. Ins. Cas. 602, the insured had committed suicide while insane. Wood, V. C., held that this was covered by the policy (which was general), because in no way contrary to public policy, though he intimated very strongly his opinion that, if the suicide had been felonious, no recovery could have been allowed under the contract of insurance. Lord Campbell's dictum was to the same effect in Moore v. Woolsey, 4 E. and B., 243. He said: "If a man insures his life for a year, and commits suicide within the year, his executors can not recover on the policy, as the owner of a ship, who insures her for a year, can not recover upon the policy if, within the year, he causes her to be sunk. A stipulation that, in either case, upon such an event, the policy should give a right of action, would be void." But the suicide of the insured, in that case, was held not to vitiate the policy, as it was the property of other persons, his creditors. This policy contained a clause in avoidance as to the insured, or his representatives, in case of suicide, but saving the rights of creditors who might become interested under it.

Bunyon, in his work on Life Assurance (*p. 71), takes the same view, that felonious suicide will always avoid a life policy owned by the assured, his representatives or family, and thinks the upholding of the policy in such case "would render those natural affections, which make every man desirous of providing for his family, an inducement to crime; for the case may well be supposed of a person insuring his life for that purpose, with the intention of committing suicide." Mr. Bliss holds the same view (§ 243), resting it on the simple proposition that "self-destruction, by a sane man, is a felony." A dictum is found to the same effect in Hartman v. Keystone Ins. Co. 21 Penn. St. 466. The policy there construed contained a clause in avoidance in case of death "by his own hand." It was avoided by the judgment of the court, on account of the fraud of the insured; but the Supreme Court said that the lower court "was very plainly right in charging that, if no such condition had been inserted in the policy, a man who commits suicide is guilty of such a fraud upon the insurers of his life, that his representatives can not recover for that reason alone." Though authorities are wanting, there thus seems to be a decided weight of opinion in support of the proposition, that the felonious suicide of the insured will avoid a life policy, for the reasons given in support of the decision in the Hatch abortion case.

THE PRIVILEGE OF AN ADVOCATE.

As early as the reign of James I. it was laid down in England "that a counselor hath a privilege to enforce anything which is informed unto him for his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false." Brook v. Montague, Cro. Jac. 90. Later, in Wood v. Gunston, Styles, 462, decided in 1655, it is said that, "if a counsel speak scandalous words against one in defending his client's cause, an action lies not against him for so doing; for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." Buller, J., in Weatherston v. Hawkins, 1 T. R. 110, says: "In actions of this kind, unless he can prove the words to be malicious, as well as false, they are not actionable;" and Lord Mansfield, in Edmonson v. Stephenson, Bull. N. P. 8, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved. But if without ground, and purely to defame, an action would lie." Hargrave v. Le Breton, 4 Burr. 24; Rogers v. Clifton, 3 B. & P. 587. The case of Hodgson v. Scarlett, 1 B. & Ald. 233, is the leading English case on this subject. The defendant, one of the leaders of the bar, and afterwards known as Chief Baron of the Court of Exchequer, under the name of Lord Abinger, was sued for having used the following words while acting as counsel in the trial of a cause: "Some actions are founded in folly, some in knavery, some in both, some in folly of the attorney, some in the knavery of the attorney, some in the folly and knavery of the parties themselves. Hodgson was the attorney of the parties, drew the promissory note, fraudulently got Bowman to pay into his hands £150 for the benefit of the plaintiff. This was one of the most profligate things I ever knew done by a professional man. Mr. Hodgson is a fraudulent and wicked attorney." The court unanimously agreed that the action would not lie. Ellenborough, C. J.: "A counsel entrusted with the interests of others, and speaking from their information, for the sake of public convenience, is privileged in commenting fairly and *bona fide*, on the circumstances of the case, and in making observations on the parties concerned, and their instruments or agents in bringing the case into court. The defendant says that he is a fraudulent and wicked

attorney. These were words not used at random and unnecessary, but were a comment upon the plaintiff's conduct as attorney. Perhaps they were too strong, it may have been too much to say that he was guilty of fraud as between man and man, and of wickedness *in foro divino*. The expression, in the exercise of a candor fit to be adopted, might have been spared. But still a counsel might *bona fide* think such an expression justifiable under the circumstances. It appears to me that the words spoken were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable." Abbott, J.: "They were spoken in a course of judicial inquiry, and were relevant to the matter in issue. I am, therefore, of opinion that no action can be maintained, unless it can be shown that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable. It would be impossible that justice could be well administered if counsel were to be questioned for the too great strength of their expressions; here the words were pertinent, and there is no pretense for saying that the defendant maliciously availed himself of his situation to utter them."

The reasons upon which rests in England the right of an advocate to speak, with the most unrestrained freedom, upon all subjects connected with the case before him, confining himself to matters pertinent to the subject on trial, are stated to be these: The counsel for a party is the legal substitute for the party himself; so far as respects the subject before the court, he is presumed to be invested with the whole person and case of his client. Whatever, therefore, law or reason would allow to a man pleading his own cause, whether in statement, or in the expression of natural feelings, belongs, to the same extent, to the counsel who represents him. Without such latitude, a counsel would be a very imperfect and inadequate representative of his client. The principle, therefore, belongs to natural justice as well as to law. It is part of the necessary means to enable an advocate to make as full and sufficient a defence as could be made by the party himself. On the other hand, there is no injury in the extravagance sometimes indulged in by an advocate under these circumstances. It goes forth only as an *ex parte* statement. It is given as such and received as such. Whatever may have been said, is amended by the same liberty allowed to the opposite counsel in answer or defence, or by the correction of the judge upon his observations on the evidence and the whole case. It is therefore clear that any restriction to the liberty of speech at the bar would be more injurious to the interests of public justice, than any latitude in the exercise of it could be to individual feeling and character. Holt, N. P. 626. The law having been so clearly settled in Hodgson v. Scarlett, with the exception of a very recent case to which we will refer hereafter, the English precedents on this subject, since 1818, are few. The law, as settled by the authorities in this country, has established the following rules upon the subject:

1. Words spoken by an advocate in the course of judicial proceedings, though they are such as impute crime to another, and, therefore, if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. Hoar v. Wood, 3 Met. 193; Bradley v. Heath, 12 Pick. 163.

2. The privilege has, however, never been carried to the extent maintained in Wood v. Gunston; it is subject to the limit that a counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party witness or third person, which have no relation to the cause or subject-matter of the inquiry. In Ring v. Wheeler, 7 Cow. 725, it was held that words charging a witness with perjury uttered by a party or his counsel in the course of a trial, may or may not be actionable, according as they were or were not spoken maliciously, were or were not pertinent to the issue; as there was or was not color for making the imputation, or as they were or were not spoken with a design to slander the witness. Burlingame v. Burlingame, 8 Cow. 141; Hastings v. Lusk, 22 Wend. 410; Mower v. Watson, 11 Vermont, 536; McMillen v. Birch, 1 Binney, 178; Gilbert v. People, 1 Denio, 41; Coffin v. Coffin, 4 Mass. 1, 50 N. Y. 309.

3. It extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal and ecclesiastical bodies. Hoar v. Wood, *supra*. Or before a church meeting: York v. Pease, 2 Gray (Mass.), 282; Farnsworth v. Storrs, 5 Cush. 417; Holt v. Parsons, 23 Tex. 9; 18 Ia. 306. Subject, however, to the restriction that they shall be made in good faith to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation. Hosmer v. Loveland, 19 Barb. 111; Howard v. Thompson, 21 Wend. 319; O'Donoghue v. McGovern, 23 Wend. 26; Hastings v. Lusk, *supra;* Fawcett v. Charles, 13 Wend. 473; Milam v. Burnsides, 1 Brevard, 295.

4. It is immaterial if the words are uttered in the course of a trial, whether in form they are addressed to the witness or to the court or jury. The remarks addressed to a witness in the form of putting a question reminding him of his duty or recurring to what he had before stated, indicating a contradiction in different parts of his testimony or calling upon him to show how he can reconcile them, though in form directed to the witness, are made in the hearing of the court or magistrate, and may constitute a part of that comment upon the evidence which has a bearing on the result. Shaw, C. J., in Hoar v. Wood, *supra*.

5. The privilege is a personal one, the subsequent publication of a speech made by counsel in a cause, containing libelous matter, being unlawful because it extends beyond what is required for the administration of justice. Rex v. Abingdon, 1 Esp. 226; Rex v. Creevey, 1 M. & S. 273; Flint v. Pike, 6 Dow. & Ry. 528; Edsall v. Brooks, 17 Abb.

Pr. 221; Republic v. Oswald, 1 Dallas. 343; Com. v. Blanding, 3 Pick. 304; King v. Root, 4 Wend. 113.

6. As to the form of the action: In Hodgson v. Scarlett, the court, while refusing to decide whether, if it could be proved that the advocate acted with express malice and without reasonable and probable cause, an action might be maintained, intimated that the plaintiff could not, even in such a case, recover in an ordinary action for slander, but would have to resort to a special action on the case, alleging express malice, and the want of probable cause. 1 Starkie, 286; Fairman v. Ives, 1 B. & A., 645; Holroyd, J., in Hodgson v. Scarlett, *supra*. In this country it is settled that the remedy is by action on the case. But where a verdict was rendered for the plaintiff in an action of slander, the court refused to arrest the judgment, the speaking of the words and the time of the utterance having been put in issue, and found against the defendant, although from the declaration it appeared that the words were spoken in the course of a judicial proceeding.

This brief statement of the law on this subject has been suggested by a case which came before the English Court of Exchequer last month, and which shows not only that the rule, as stated above, is firmly established in that country, but that the public have either never known or have forgotten it. Its announcement, after a lapse of years, has called forth a torrent of abuse and a great deal of protest from the newspapers, that "a law court, which should be the home and safeguard of justice, is the only charmed spot in England where gross injustice, as far as defamation of character is concerned, may be perpetrated." The facts in this case (Lewis v. Higgins, 62 L. T. 98) were these: The plaintiff had been a solicitor in certain proceedings, in the course of which a criminal prosecution was instituted and failed. Some time after, in an argument before one of the chancelors, the defendant, an eminent equity lawyer and queen's counsel, referring to the proceedings which the plaintiff had commenced, said: "Is not that putting a pistol to a man's head? Is not that more than any highway robbery, and more than any crime of the ordinary sort for which men are transported and convicted every day before magistrates and judges?" For these and other words, defamatory of his conduct as an attorney, the plaintiff brought suit. On the trial, after the opening speech for the plaintiff, Kelly, C. B., informed the counsel that he would receive evidence only on two points; first, whether the words were spoken, and, secondly, on what occasion they were used. "I must tell the jury," said the learned judge, "that the law of England forbids me to enter into any other questions in the case, and does not authorize them to enter into and determine upon the merits of a case, affecting the character of a member of the bar, which depends entirely upon what has been stated by him in a cause legitimately before the judge in a court of justice. This has been held to be the law, over and over again. * * * I think it essential that you and the public should clearly understand that the privilege claimed by the defendant as applicable to this case is not that of counsel, but the privilege of the people of England as represented by counsel. It is essential to the well-being of the whole community that a counsel, when once engaged, should discharge his duty fearlessly, without the shadow of a shade of apprehension as to the consequences." Upon this ruling, the object of the plaintiff in bringing the suit—that of denying upon oath the truth of the charges against him—being frustrated, he accepted a nonsuit.

Yet, after all, is the privilege of an advocate, as laid down in the books, to speak as he thinks proper during the trial of a cause in which he is engaged, so great a matter as it appears at first sight? If the rule were otherwise, it would, doubtless, be inconvenient; as was said on circuit in the leading English case, the business of one assize might be taken up with the trial of actions arising at a former assize. But there are restraints more powerful than the fear of an action at law. When the Chief Baron in the last case, as a climax to his vindication of the independence of the English bar, asked, "What would become of a case between the crown and a helpless individual in some proceeding, civil or criminal, unless counsel were at liberty fearlessly to defend his client without fear of consequences," did he purposely forget one of the most celebrated of modern trials, which attracted for years the attention of the people of three continents, and filled every day, month after month, one of the halls in the very building where he was then sitting and delivering judgment? If the action of Gray's Inn and the fate of Dr. Kenealy are beneath the notice of an English judge, the result of too much "fearlessness" on the part of an eminent counselor of this city, in the notorious government prosecutions of last year, may certainly furnish an abundant answer, so far as the American lawyer is concerned, to the query of the learned judge.

GUARDIAN AND WARD.

METCALF v. LOMAX.

Supreme Court of Alabama, December Term, 1876.

HON. R. C. BRICKELL, Chief Justice.
" A. R. MANNING, } Associate Justices.
" GEO. W. STONE, }

1. PRIMARY AND ANCILLARY GUARDIANSHIP—VALID PAYMENT.—Plaintiff, at the time the fund in controversy accrued to her, was an infant residing with her father in Alabama, to whom letters of guardianship were issued. For the purpose of receiving a legacy to which plaintiff was entitled in Georgia, a guardian was also appointed by the courts of that state, who, after collecting the legacy, paid it over to the father. *Held*, that the payment was rightfully made. An ancillary guardian of foreign appointment can not be called to account a second time for money assets of the ward, which such guardian has previously paid to the domiciliary guardian.

2. CANONS ESTABLISHED—SITUS OF PROPERTY—PRIMARY AND ANCILLARY ADMINISTRATORS.—In the kindred trust of executor or administrator the following rules are established: That the *situs* of chattels or movables is that of the owner; that the power and authority of the personal

representative of the decedent have no extra-territorial operation; that the representative appointed in the jurisdiction within which decedent had his last residence, is the primary or chief administrator; that other jurisdictions, within which decedent has goods or effects, may appoint administrators for the same; but such administrator, so appointed, is subordinate and ancillary to the administrator at the last residence.

3. DOMICILE OF INFANT.—The domicile of the father is the domicile of an infant child. It is not changed by the infant's temporary absence at school or elsewhere. The infant can not, of his own motion, acquire a new domicile; but it may be changed by his father.

APPEAL from Montgomery Chancery Court.

STONE, J., delivered the opinion of the court:

In Wharton's Conflict of Laws, § 559, it is said: "The state wherein a ward is domiciled, is that which, both in interest and in conscience, is charged with his protection, and it is that, therefore, which, on general principles, should nominate and direct the guardian of such ward. Hence, by the uniform practice of European continental states, the guardian appointed by such home authority has control of his ward's estate abroad as well as at home. * * * This, however, does not prevent the appointment of special subordinate guardians to take charge of the ward's estate in remote territories." The same author, in Section 260, quotes approvingly from Sir R. Phillimore, as follows: "Whatever may be the differences in the positive laws of different states, with respect to the mode of constituting a guardian, the rule of international comity imperatively demands that a guardian duly constituted, according to the laws of the domicile of the ward, should be recognized as such by all other countries." See an able discussion of this question, Nugent v. Vetzen, 2 Eq. Cases (Law Rep.), 704.

The domicile of the father, as a general rule, is the domicile of an infant child. "*Prima facie*, the infant's residence or domicile is that of his parent, and such it will remain during minority, in spite of his temporary absence at school or elsewhere. Nor can he, of his own motion, acquire a new domicile, since he is not a person *sui juris*. But his domicile may be changed by his father, if he has one." Schouler, Dom. Rel., 412; Id. 312. Gibson, C. J., in School Directors v. James, 2 Watts & Serg. 570, says: "The domicile of an infant is the domicile of his father during the father's lifetime." The same doctrine is asserted by this court, in the case of Johnson v. Copeland, 35 Ala. 521.

For general purposes, personal property is not localized—has no independent *situs*. It follows the residence of the owner, and, in case of his death, it is distributed according to the law of his domicile. See Parsons v. Lyman, 20 N. Y. 112; Johnson v. Copeland *supra*; Story Confl. of Laws, § 362; Wilkins v. Ellett, 9 Wall. 740. In the kindred trust of executor or administrator, certain canons are settled and admitted in all courts. Among these are, that the *situs* or residence of chattels or moveables is that of the owner; that the power and authority of the personal representative of the decedent have no extra-territorial operation, but are limited to the state or country from which such representative receives his appointment; that the representative appointed in the jurisdiction within which decedent had his last residence, is the primary or chief administration; that other jurisdictions in which decedent has goods or effects, may appoint administration of the same; but such administration, so appointed, save for certain purposes of local policy, claimed and exercised by all nations, is subordinate and ancillary to the administration of the last residence. See Wilkins v. Ellett, *supra*; Dawes v. Boylston, 9 Mass. 337; Jennison v. Hapgood, 10 Pick. 77; Parsons v. Lyman, *supra*.

There is an eminent propriety in having the personal effects of a ward in the same jurisdiction in which such ward has his or her residence. It will, as a general rule, be better cared for and administered at that place. The near relations of the ward, with whom such ward is most likely to reside, will be more watchful, than strangers would be, of the financial condition of the sureties on the guardian's bond. Many other reasons, without being here enumerated, will suggest themselves why the personal property of the ward should be under the control of the guardian, who has the custody of the ward. The case of Dorman v. Ogbourne, 16 Ala. 759, is persuasive to show that the same rule and policy, which obtain in primary and ancillary administrations, prevail between guardianship of the domicile and foreign guardianship.

The complainant, Anna P. Metcalf, *nee* Howard, so far as the record informs us, was always a resident of Alabama. At the time when complainant's right to the fund in controversy accrued, and ever afterwards, she resided with her father in Alabama. When he took out letters of guardianship in this state, he became domiciliary guardian of both her person and estate,—of the latter, within the territorial jurisdiction of Alabama. Mrs. Lowther's guardianship in the state of Georgia was, in its nature, ancillary. Its purpose and office were to receive the pecuniary legacy of ten thousand dollars, to which complainant was entitled under the will of Mrs. Parish. Under the laws of Georgia, it was thought necessary to have such local guardian to receive the legacy from Mrs. Parish's executor, and give him a proper receipt and acquittance. This, however, did not have the effect of making Mrs. Lowther's the primary or controlling guardianship, although first in time. It still possessed only the properties of an ancillary guardianship, auxiliary to the guardianship of the domicile. When she paid over the assets to Mr. Howard, the father of complainant, having the right to her care and custody, and domiciliary guardian by rightful appointment, she only placed the fund where it rightfully belonged. See Skinner v. Frierson, 8 Ala. 915; Willis v. Willis, 16 Ala. 652; Bogle v. Bogle, 23 Ala. 544.

The courts of Alabama, in view of their own policy, can not hold such payment wrongful. In Wilkins v. Ellett, 9 Wall. 740, the domiciliary administration was in Alabama, where the intestate had his residence at the time of his death. A debtor of the estate, residing in Tennessee, had there made payment of the debt to the administrator-in-chief, taking his receipt against the claim. Subsequently, an administrator of the estate was appointed in the state of Tennessee, who brought suit against the debtor to recover the said debt. The payment to the Alabama administrator was relied on in defense. The court held the payment good, remarking: "It has long been settled, and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and, if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease. * * * The original administration, therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased, for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue, according to the law of the place, or directions of the will, as the case may be." It does not follow from this that the courts of Georgia, in the condition in which the record shows the guardianship of Mrs. Lowther to have been, would have made any order compelling her to pay over the fund to the home guardian.

They probably would not. In a case like this, Lary v. Craig, 30 Ala. 631, this court refused to make an order requiring a resident guardian to pay over personal assets to a guardian of foreign appointment. It becomes a very different question, however, when the attempt is made, in the courts of Alabama, to hold an ancillary guardian of foreign appointment, to account a second time for the money assets of the ward, which such guardian had previously paid to the domiciliary guardian who, all the while, has resided with his ward in the state of Alabama. The money having reached its proper destination, we hold it is rightfully there.

The decree of the chancery court is affirmed.

NOTICE OF DISSOLUTION OF PARTNERSHIP.

LOVEJOY *ET AL.* v. SPAFFORD *ET AL.*

Supreme Court of the United States, October Term, 1876.

To discharge a member of a firm from a claim of one who had no dealing with it prior to its dissolution, but who knew of its existence, and who were its members, it is not necessary that the latter should have received actual notice of the dissolution, or that notice should have been published in a newspaper at the place of business; it is sufficient if the notice of dissolution was so generally communicated to the business men of the vicinity, as to be likely to come to the knowlege of all.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

Mr. Justice HUNT delivered the opinion of the court:

The action was by the holder of two drafts, dated September 27, 1870, drawn by J. B. Shaw upon J. B. Shaw & Co., and accepted in the name of J. B. Shaw & Co. The object of the action was to charge Lovejoy as a partner. The firm of J. B Shaw & Co. was formed on the 15th day of April, 1868; transacted a lumber business at Davenport, Ia., and continued until the 12th day of May, 1870, when it was dissolved by an instrument in writing. In fact, Lovejoy was not a member of the firm of J. B. Shaw & Co., nor was there in existence such a firm, when the drafts were accepted in its name. The acceptance in the firm-name was a fraud on the part of Shaw.

The questions arising upon the bill of exceptions grow out of the sufficiency of the notice of the dissolution of the firm, given by the retiring member. Formal notice was given to all those who had previously dealt with the firm. It does not appear whether there had been any change of signs, nor whether the firm had any external sign. No evidence was given, that notice of the dissolution was published in any newspaper, and it was proven that two daily newspapers were published in Davenport at the time of the dissolution. After that time, the business was carried on in the name of J. B. Shaw alone. Prior to the present transaction, the plaintiffs, in discounting its paper, had heard of the firm, and who were its members. They testified that they had no information of the dissolution till some time after its occurrence. The drafts in suit were given for lumber sold by the plaintiffs and by one Mead, were drawn by Shaw and accepted by him, in the name of the firm, at Read's Landing, where the lumber was sold. There was no evidence that the firm had ever had any other transaction in Eau Claire or Read's Landing. No evidence was given of the relative position of the places in question; but, from maps and gazetteers, we learn that Eau Claire is in the interior of the State of Wisconsin, and distant several hundred miles from Davenport, in the State of Iowa. Read's Landing is not far from Eau Claire.

The case was tried by the circuit court, upon the theory that, to discharge a member of a firm from the claim of one who had had no dealing with it prior to its dissolution, but who knew of its existence, and who were its members, it was necessary that the latter should have received actual notice of the dissolution, or that notice should have been published in a newspaper at the place of business. This doctrine was not announced in terms, but such was the result of the trial. Either of these notices was held to be sufficient; but it was held that, without one of them, the retiring member could not protect himself. In terms, the holding of the judge was, that there must be either actual notice or public notice; and it will be seen from the offers and exclusions presently to be stated, that this public notice could mean only a newspaper publication. Thus, the witness, Barnard, after testifying that he had been in business at Davenport, prior to May 12, 1870, until the time of the trial, that he had business relations with all the lumber dealers at that place, and knew them all, and that he knew of the dissolution when it occurred, was then asked whether or not it was generally known at Davenport, at the time the firm was dissolved, that such dissolution had taken place. To which the plaintiffs objected, on the ground that the same was incompetent and immaterial. Which objection was sustained, and the defendant, Lovejoy, excepted, and his exception was noted.

Defendants' counsel then asked the witness: "State whether or not it was generally known, at this time, along the river that this dissolution had taken place." To which plaintiffs made the same objection as before, and the objection was sustained, and an exception taken by defendant Lovejoy and noted. Defendants' counsel then asked the witness: "Did you, at or near the time of the dissolution, communicate the fact that it had occurred, to any persons other than the plaintiffs; and, if so, to whom, and in what manner?" To which the plaintiffs made the same objection as before; which objection was sustained, and an exception was taken and noted for defendant Lovejoy. Counsel for defendant Lovejoy stated, in connection with the questions to the witness Barnard, that he did not expect to prove actual notice of the dissolution to the plaintiffs, or to the persons who sold the lumber.

John C. Spetzler was sworn as a witness in behalf of the defendant, and testified that, in May, 1870, he was in the employment of J. B. Shaw & Co., in their yard at Davenport, as salesman; that the business was conducted after the dissolution by Shaw, in the name of J. B. Shaw. The defendant proposed to prove by the witness that the dissolution, immediately upon its occurrence, was a matter of general repute and knowledge in the city of Davenport, where the firm did business, and that all lumber dealers in Davenport were informed of it. To which plaintiffs objected, on the ground that the same was incompetent and immaterial; which objection was sustained. To which the defendant Lovejoy excepted, and his exception was noted. Sumner W. Farnham, not a partner, was sworn on behalf of the defendant, and testified that, in September, 1870, and before the transaction in question, he visited Eau Claire in company with J. B. Shaw; was there two or three days, and called on the lumber dealers of that place. The witness was then asked whether, on that occasion, he or Shaw gave any notice to the lumber dealers of Eau Claire of the dissolution of the firm of J. B. Shaw. If so, to whom, and in what manner? To which the plaintiffs objected, on the ground that the same was incompetent and immaterial, unless the defendant proposes to prove actual notice to plaintiffs, or to those who sold the lumber, or notice by publication in a newspaper. The objection was sustained by the court, and the defendant Lovejoy

excepted, and his exception was noted. The defendant then offered to prove by this witness that, while he and Shaw were at Eau Claire on this occasion, and before the sale of the rafts in question, the said Shaw, in the presence of the witness, notified all, or nearly all, of the lumber dealers in Eau Claire, where plaintiffs then lived and did business, and in the vicinity, that the firm of J. B. Shaw & Co. had dissolved, and that Farnham & Co. had sold out to Shaw. To which the plaintiffs objected, on the ground that the same was immaterial and incompetent, unless the defendant proposes to show actual notice to the plaintiffs, or to those who sold the lumber; which objection was sustained, and the defendant Lovejoy excepted, and his exception was noted.

In Pratt v. Page, 32 Vt. 11, cited as an important case, it was held that, to entitle a plaintiff to recover in a case like the present, these facts must appear: 1. The claimant must have known, at the time of making his contract, that there had been a partnership. 2. That he did not then know of its dissolution. 3. That he supposed he was entering into a contract with the company when he made it. In the court below, the plaintiff recovered on the ground of want of sufficient notice of dissolution; but in the appellate court that question was not reached. In City Bank of Brooklyn v. McChesney, 20 N. Y. 240, the bank, having had previous knowledge of the existence of the firm of Dearborn & Co., of which the defendant, McChesney, was a member, discounted a note made in the firm-name; but, after the partnership was in fact dissolved, without knowledge or information on the part of the bank, it was held, there being no publication of dissolution, that the retiring partner was liable. The court makes no examination of the law, but adopts, as the basis of its judgment, the opinion of Senator Verplanck, in Vernon v. Manhattan Co., 22 Wend. 183. In that case Senator Verplanck made use of this language: "Now, following out this principle, how is a person, once known as a partner, to prevent that inducement to false credit to his former associates which may arise, after the withdrawal of his funds, from the continued use of the credit which he assisted to obtain? How shall he entitle himself to be exempted from future liability on their account? The natural reply is, he must take all the means in his power to prevent such false credit being given. It is impossible for him to give direct notice of his withdrawal to every man who may have seen the name of his former firm, or have accidentally received its check or note. No man is held to impossibilities. But he does all he can do in such a case by withdrawing all the exterior indications of partnership, and giving public notice of dissolution in the manner usual in the community where he resides. He may have obtained credit for his copartnership, by making his own interest in it known through the course of trade. So far as those are concerned who have had no direct intercourse with the firm, he does all that is in his power to prevent the continuance and abuse of such credit, if he uses the same sort of means to put an end to that credit which may have caused it. But there are persons with whom he or his partners may have transacted business in the copartnership name and received credit from. To such persons he has given more than a general notice of the partnership; for he has directly or indirectly ratified the acts of the house, and confirmed the credit that may have been given, either wholly or in part, upon his own account. He knows, or has it in his power to know, who are the persons with whom such dealings have been had. Public policy, then, and natural justice alike, demand that he should give personal and special notice of the withdrawal of his responsibility to every one who had before received personal and special notice, either by word or acts, of his actual responsibility and interest in the copartnership. Justice requires that the severance of the united credit should be made as notorious as was the union itself. This is accomplished by the rule that persons, having had particular dealings with the firm, should have particular notice of the dissolution or alteration; but that a general notice, by advertisement or otherwise, should be sufficient for those who know the firm only by general reputation." Both the senator and chancelor, and the court in McChesney's case, agree in the opinion that persons who merely take or receive for discount the paper of a firm, are not to be deemed dealers with the firm, so as to be entitled to actual notice.

In Bristol v. Sprague 8 Wend., 423, which was an action against a retired partner, upon a note made after the dissolution, Nelson, J., says: "It is well settled that one partner may bind another after dissolution of the firm, if the payee or holder of the note is not chargeable with the notice, express or constructive, of the dissolution of the partnership (6 I. R., 144; 6 Cowen, 701), and that such notice must be specially communicated to those who had been customers of the firm, and as to all others, by publication in some newspaper in the county, or in some other public and notorious manner." In Ketcham v. Clark 7 Johns. 147, Van Ness, J., said: "In England it seems to be necessary that notice should be given in a particular newspaper, the London Gazette; but we have no such usage or rule here. I think, however, we ought at least to go so far as to say that public notice must be given in a newspaper of the city or county where the partnership business was carried on; or, in some other way, public notice of the dissolution must be given. The reasonableness of it may, perhaps, become a question of fact in the particular case." Mr. Parsons, in his treatise on Partnership (p. 412, 413), gives this rule: "In respect to persons who have had dealings with the firm, it will be necessary to show either notice to them of a dissolution or actual knowledge on their part, or at least adequate means of knowledge of the fact. As to those who have not been dealers, a retiring partner can exonerate himself from liability by publishing notice of the dissolution, or by showing knowledge of the fact." He adds: "A considerable lapse of time between the retirement and the contracting of the new debt would, of course, go far to show that it was not, or should not have been contracted on the credit of the retiring partners." Mr. Justice Story, in his work on Partnership, says: The retiring partner "will not be liable to mere strangers who have no knowledge of the persons who compose the firm, for the future debts and liabilities of the firm, notwithstanding his omission to give public notice of his retirement; for it can not be truly said in such cases, that any credit is given to the retiring partner by such strangers."—§ 160. In a note he discusses the doctrine as laid down by Bell and Gow, and adheres to the rule as above announced. Mr. Watson says that to dealers actual notice must be given; as to strangers, he says: "An advertisement in the London Gazette is the most usual and advisable method of giving notice of a dissolution to the public at large." Watson on Part. 385. In his commentaries on the law of Scotland, Professor Bell, in speaking of a notice to dealers, says: "An obvious change of firm is notice; for it puts the creditor on his guard to inquire as at first. So the alteration of checks or notes, or of invoices, is good notice to creditors using those checks and invoices." As to notice to strangers, he says: "As it is impossible to give actual notice to all the world, the law seems to be satisfied with the Gazette's advertisement, accompanied by a notice in the newspaper of the place of the company's trade, or such other fair means taken, as may publish as widely as possible the fact

of dissolution." The Gazette notice he holds to be one circumstance to be left to the jury. 2 Bell's Com. 640-1. In Wardwell v. Haight 2 Barb. S. C. 549, 552, Edmunds, J., says: "The notice must be a reasonable one. It need not be in a newspaper. It may be in some other public and notorious manner. But, whether in a newspaper or otherwise, it must, so far as strangers and persons not dealers with the firm are concerned, be public and notorious, so as to put the public on its guard."

In view of these authorities we are of the opinion that the rule, adopted by the judge on the trial of this cause, was too rigid. We think it is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. That is one of the circumstances contributing to, or forming, the general notice required. It is an important one; but it is not the only, or an indispensable one. Any means that, in the language of Mr. Bell, are fair means to publish as widely as possible the fact of dissolution, or which, in the words of Judge Edmunds, are public and notorious so as to put the public on its guard; or, in the words of Judge Nelson, notice in any other public or notorious manner; or, in the language of Mr. Verplanck, notice by advertisement or otherwise, or by withdrawing the exterior indications of partnership and giving public notice in the manner usual in the community where he resides, are means and circumstances proper to be considered on the question of notice.

When, therefore, the defendant proved that actual notice had been given to all those who had dealt with the firm; that all subsequent business was carried on in the name of the remaining partner only, thus making a marked change in the presentation of the firm, when the claimants received and obtained the draft at a distance of several hundred miles from the place where the firm did business, and there was no evidence that the firm had ever before transacted any business in that place,—we think the evidence offered should not have been excluded. When the defendant offered to prove that it was generally known along the Mississippi river that the dissolution had taken place, and offered evidence showing to whom, to what extent, and in what manner notice had been given; that all the lumber dealers in Deavenport were notified and knew of the dissolution; that at Eau Claire, on the occasion of the transaction in question and before the drafts were made, notice was either given to all, or nearly all, of the lumber dealers in that place that the firm had been dissolved,—we think the evidence was competent to go before the jary.

The question is not exclusively, whether the holders of the paper did in fact receive information of the dissolution. If they did, they certainly can not recover against a retired partner. But if they had no actual notice, the question is still one of duty and diligence on the part of the withdrawing partner. If he did all that the law requires, he is exempt, although the notice did not reach the holders. The district judge held peremptorily that there must be either actual notice or public notice,—in effect, that it must be through a newspaper,—and excluded other evidence tending to show a public and notorious disavowal. In this we think he erred. He refused to admit evidence which would have sustained the fifth request to charge, that if the notice was so generally communicated to the business men of Eau Claire as to be likely to come to the claimants' knowledge, the jury are at liberty to find such knowledge. In this we think he erred.

Without prescribing the precise rule which should have been laid down, we are of the opinion that the errors in the rulings were of so grave a character that a new trial must be ordered. New trial ordered.

NEGLIGENCE—LAW AND FACT.

FERNANDEZ v. SACRAMENTO CITY R. R.

Supreme Court of California, December, 1876.

HON. WILLIAM T. WALLACE, Chief Justice.
" JOSEPH B. CROCKETT, } Associate
" ADDISON C. NILES, } Justices.
" AUGUSTUS L. RHODES, } Justices.
" E. W. MCKINSTRY, }

1. NEGLIGENCE WHEN A QUESTION OF LAW.—If there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law; but it does not necessarily follow, because there is no conflict in the testimony, that there is no issue which must be submitted to the jury.

2. NEGLIGENCE, WHEN A QUESTION OF FACT.—If the circumstances under which a person acted were complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, whether he was guilty of negligence, is a question of fact for the jury.

3. THE CONTRIBUTORY NEGLIGENCE which will justify a nonsuit must have proximately contributed to the injury suffered by the plaintiff.

The defendant owned and operated a street railway, the cars of which, drawn by horses, passed along its tracks at stated intervals, only a few minutes apart. The plaintiff was employed by a gas company, and while so employed he dug a ditch, running between the two tracks of the defendant's road, and at right angles therewith. He knew that the cars passed frequently; but he did not watch them. While he was in the ditch, two or three feet from the track, and with his back toward the track, a car approached. When immediately opposite the plaintiff, the horses plunged or shied, and one of them fell into the ditch and upon the defendant, injuring him severely. He brought an action against the railway company, in which the jury found a verdict for the defendant. The instructions to the jury, and most of the facts of the case, sufficiently appear from the opinion of the court.

Hamilton & Dunlap, for appellant; *McKune & Welty*, for respondent.

CROCKETT, J., delivered the opinion of the court:

The action is to recover damages for personal injuries alleged to have been occasioned by the negligence of defendant's servant, and there is no controversy in respect to certain facts in the cause, which were established by uncontradicted evidence. These facts were, that the defendant was the owner of a line of street cars, propelled by horses, in the city of Sacramento, and operated with a double track, running easterly and westerly along K street; that the two tracks were separated by a space about five feet wide; the cars going west, passing over the track on the northerly side of the street, and those going east passing over the other track. That the cars were in the habit of passing over these tracks at short intervals, as was well known to the plaintiff, who was a laborer employed by the gas company, and, when he received the injury complained of, was engaged with another laborer in laying a gas-pipe across K street, beneath the railroad tracks; that on the southerly side of the street an open cut had been made across that side of the street northerly as far as the southerly side of the south track, beneath and across which an opening had been made sufficiently large to admit the pipe, but without disturbing the surface of the street within the track; that on the north side of this track, and in the space between the two tracks, an open cut had been made about three feet deep to receive the pipe, in which cut the plaintiff was at work, when one of the

defendant's cars, drawn by two horses, and going east on the southerly track, approached the place at which the plaintiff was at work; that when opposite the plaintiff, the horses became frightened, and, getting off the track, fell into the cut in which the plaintiff was at work, and thereby inflicted upon him serious bodily injury. As to these facts, there is no conflict in the evidence. The plaintiff claims, and there was evidence tending to prove, that the injury was caused by the negligence of the driver of the car, in approaching the cut at too rapid a gait, and holding the lines loosely in his left hand, while with his right hand he held a pipe in his mouth, and thereby lost control of the horses when they became frightened. There was, however, a substantial conflict in the evidence on this point. On this state of facts, the court, on the request of the defendant, gave to the jury the following instruction:

"That if the plaintiff in this case was working in a dangerous place, and knew that the cars of the defendant, drawn by horses, passed the point of excavation, in which the plaintiff was working, at stated periods, it was his duty to notice that fact, and get out of the excavation and away from the immediate vicinity of the track, while the horses were passing, if they passed on time; and if he did not do so, he was guilty of negligence, and not entitled to recover in this action if that accident was the proximate cause of the injury."

The words, "if that accident was the proximate cause of the injury," are unintelligible in the connection in which they are used, and must be disregarded. There was no controversy at the trial as to any of the facts hypothetically stated in the instruction, unless it be on the question whether the place, at which the plaintiff was at work, was a "dangerous" place. The plaintiff admitted, on the witness-stand, that he knew that the cars, drawn by horses, passed the point at which he was at work every few minutes, and that he did not get out of the excavation, and away from the immediate vicinity of the track, while the horses were passing. The only fact left to the jury by the instruction, not admitted by the plaintiff, was whether he was at work at a "dangerous" place; and, in legal effect, the instruction directed the jury that, if the plaintiff was at work in a "dangerous" place, he was guilty of contributory negligence, and could not recover. The term "dangerous" was in no manner explained or qualified by the instruction, nor was the jury informed to what extent, or under what circumstances, it must have been "dangerous," in order to defeat a recovery. Under this instruction the jury was bound to find for the defendant, even though the place was rendered dangerous solely by reason of the gross negligence of the defendant or its servants, and that too, without reference to the extent or degree to which it was dangerous, or to the question whether the fact that it was dangerous contributed proximately or only remotely to the injury. The serious injury suffered by the plaintiff conclusively proved that, under certain circumstances, it was dangerous to be in the excavation when the horses were passing, and the instruction practically took the case from the jury. It wholly ignored and excluded from the jury the question whether the place would not have been safe and free from danger in the absence of negligence on the part of the defendant or its servants; and also the further question, whether, if in any degree dangerous, it was sufficiently so to deter a person of ordinary caution and prudence from remaining in the excavation while the horses were passing.

The principles decided in Clayards v. Dethick, 12 Q. B. 439, are strictly analogous to those involved in this case. In that case the defendant had dug a ditch through a narrow alley-way leading from the plaintiff's stable, through which he was obliged to pass in removing his horses to the highway. A very narrow space was left on each side of the ditch, and along one of these spaces the plaintiff attempted to lead his horse, in doing which the horse fell into the ditch and was killed. The action was for the value of the horse, alleged to have been killed through the negligence of the defendant. The defense was, that the plaintiff was guilty of contributory negligence in attempting to lead the horse along a place evidently dangerous. But the court below submitted to the jury the question of the plaintiff's negligence, and this ruling was affirmed in the Court of Queen's Bench. Patterson, J. said: "The whole question was, whether the danger was so obvious that the plaintiff could not, in common prudence, make the attempt. This was properly left to the jury." Coleridge, J., said, the question was properly left to the jury, "whether the plaintiff acted as a man of ordinary prudence would have done, or rashly and in defiance of warning. The plaintiff was not bound to abstain from pursuing his livelihood because there was some danger. It was necessary for the defendant to show a clear danger and a precise warning." So, in the case at bar, the plaintiff had a right to pursue his work in the excavation, unless "the danger was so obvious" that "he could not, with common prudence," continue it.

These questions should have been submitted to the jury; but the court practically decided, as matter of law, that the plaintiff was guilty of contributory negligence by remaining in the excavation while the horses were passing; and this brings us to the inquiry under what circumstances the question of negligence is to be decided by the court as a matter of law, and when by the jury as a mixed question of law and fact, under the instructions of the court. The authorities on this point are not uniform, some of them holding that negligence is always a mixed question of law and fact, to be submitted to the jury under instructions from the court; while a great number of the modern decisions (supported, we think, by the better reasoning) are to the effect, as stated in Shearman and Redfield on Negligence, §11, that, "when the facts are clearly settled, and *the course which common prudence dictated* can be clearly discerned, the court should decide the case as a matter of law." We adopted this rule in Fleming v. W. P. R. R. Company, 49 Cal. 253, and held as a matter of law, on the undisputed facts of that case, that the plaintiff had been guilty of contributory negligence and was not entitled to recover. We adhered to this ruling in Deville v. S. P. R. Co., 50 Cal. 383, nor do we see any reason to doubt its correctness. Negligence is always a mixed question of law and fact, and when the facts are doubtful, they must be submitted to the jury, under such instructions from the court as will enable them to apply the law to the facts. But when there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law. In such a case, there is no function for the jury to perform in respect to the question of negligence. But there is a large class of cases in which, though all the facts are admitted, a question arises whether the act imputed to a party as negligence, was such as persons of ordinary prudence would have performed under the circumstances, and the court is unable to determine that question from the nature of the act itself and the other undisputed facts. In such cases it should be submitted to the jury, whether the act in question was such as ordinary prudence dictated, or to the contrary. The case of Clayards v. Dethick, above cited, forcibly illustrates the rule under discussion. It was admitted that the defendant had negligently dug a deep ditch through a narrow alley, along which the plaintiff was

entitled to pass with his horse, leaving a narrow margin at the sides, along one of which the plaintiff attempted to lead his horse, in doing which the horse fell into the ditch and was killed. There was no controversy as to these facts; but the court, being unable to determine whether a person of ordinary prudence would have attempted to lead his horse through the alley under the circumstances, properly left that question to the jury. On the other hand, in Fleming v. W. P. R. R. Co., we held that, on the facts admitted by the plaintiff, it was perfectly apparent that a person of ordinary prudence would not have acted as he had done, and hence we decided, as a matter of law, that he was guilty of contributory negligence. These two cases will elucidate the question under review; and we deem it unnecessary to attempt a collation of the numerous authorities on the point. There can be no possible doubt, we think, both on reason and authority, of the correctness of the rule here announced.

As was said by Mr. Justice Johnson, in Ireland v. O. H. and S. Plank Road Co., 3 Ker. 533, "It by no means necessarily follows, because there is no conflict in the testimony, that the court is to decide the issue between the parties as a question of law. The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as a matter of law. On the contrary, it is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases the inference can not be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout. Presumptions of fact, from their very nature, are not strictly objects of legal science, like presumptions of law." In Kellogg v. N. Y. C. R. R. Co., 24 How. Pr. 177, Mr. Justice Mason, after quoting approvingly the foregoing opinion of Mr. Justice Johnson, adds: "What constitutes negligence in such cases, is determined by an inference of the mind from the facts and circumstances of the case, and as minds are differently constituted, the inference from a given state of facts and circumstances will not always be the same. I admit the facts may be so clear and decided that the inference of negligence is irresistible, and in every such case it is the duty of the judge to decide; but when the facts, or the inference to be drawn from them, are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions." So in Gaynor v. O. C. and N. R. Co., 100 Mass. 21, Colt. J., in delivering the opinion of the court, said: "Courts must take notice of that which is matter of common knowledge and experience and when the plaintiff's case fails to disclose the exercise of ordinary care, as judged of in the light of such knowledge and experience, h shows no right to a recovery. Ordinarily, however, it is to be settled as a question of fact in each case as it arises, upon a consideration of all the circumstances disclosed, in connection with the ordinary conduct and motives of men, applying as the measure of ordinary care the rule that it must be such care as men of common prudence usually exercise in positions of like exposure and danger. When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact, to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to."

We think these cases, and many others of like import, which might be cited, state the rule correctly; and the conclusion to be drawn from them is that, if it clearly appears from the undisputed facts, judged of in the light of that common knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, negligence, in such a case, is a question of law to be decided by the court. In all other cases, the question must be submitted to the jury, under proper instructions.

In support of these views we refer also to the late work of Mr. Field on the Law of Damages, who, at page 519, states the rule to be that, "to justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room to doubt; and all material facts must be conceded or established beyond controversy." The rule we have announced is also supported by the following recent adjudications: Johnson v. Bruner, 61 Penn. St. 58; Quick v. Holt, 99 Mass. 164; B. C. P. R. Co. v. Wilkinson, 30 Md. 226; Barton v. St. L. and I. M. R. Co., 52 Mo. 253; Rudolphy v. Fuchs, 44 How. Pr. 155; Sexton v. Zell, 44 N.. Y 430; Perkins v. Decker, 21 Ohio St. 212.

At the trial, the Court, on the request of the defendant, instructed the jury that "the gravamen of this action is negligence of defendant, and plaintiff can not recover if he contributed in any degree to the injury sustained by him." The instruction is erroneous, in that it omits the important qualification that, in order to defeat a recovery, the negligence of the plaintiff must have contributed *proximately* to the injury. Counsel contends that the instruction as given was authorized by the language of the opinion of this Court in Gay v. Winter, 34 Cal. 153, and in Needham v. S. F. and S. J. R. R. Co., 37 Cal. 409.

There are some isolated expressions in these opinions which, if separated from the context, might lend some countenance to the proposition contended for; but taking the opinions as a whole, it is perfectly plain that there is nothing in them to justify the conclusion drawn from them by the counsel. A question was raised at the argument, whether the plaintiff had reserved exceptions at the trial to the instructions of which he complains. But though the language is somewhat ambiguous, we think, it sufficiently appears that the exceptions were reserved.

Judgment and order reversed, and cause remanded for a new trial. McKinstry. J., not having heard the argument, expressed no opinion.

NOTE.—For several comparatively recent cases, in each of which the court declared, as a matter of law, that the plaintiff had been guilty of contributory negligence, and, therefore, could not recover, see Fleming v. W. P. R. R. Co., 49 Cal. 253; Deville v. S P. R. R. Co., 49 Cal. 383; P. & C. R. R. Co. v. McClurg, 56 Pa. St. 294; Delaney v. M. & S. R. W. Co., 33 Wis. 67; Nicks v. Town of Marshall, 24 Wis. 139; Langhoff v. M. & P. R. R. Co., 23 Wis. 43; Rothe v. M. & S. R. W. Co., 21 Wis. 256; Lewis v. B. & O. R. R. Co., 38 Md. 579; P. & C. R. R. Co. v. Andrews, 39 Md. 329; Haight v. N. Y. C. R. R. Co., 7 Lans. 11; Gonzales v. N. Y. & H. R. R. Co., 38 N. Y. 440; Wilcox v. R. W. & O. R. R., 39 N. Y. 359; Morris v. Haslan, 33 N. J. L. 147. The case of Fernandez v. Sac. City Railway Co. must be regarded as overruling some prior opinions expressed by the same court. In Gay v. Winter, 34 Cal. 163, Mr. Justice Sanderson, delivering the opinion of the court, said: "The gravamen of the action is the negligence of the defendant, and, as a general proposition, it follows therefrom, that the plaintiff can not recover if it appears that his own negligence contributed, in any degree, to the injury which he has sustained." Language, substantially identical, was used by the same judge in pronouncing the judgment of the same court in Needham v. S. F. & S. J. R. R. Co., 37 Cal. 419. The counsel for the defendant in the Fernandez case, in preparing his in-

structions, but copied the language of the Supreme Court of his own state. This practice is generally safe. In this particular case it proved unsafe; for the court now maintains that it is not sufficient that the negligence of the plaintiff should have contributed, *in some degree*, to his injury. The negligence of plaintiff must have, *proximately*, contributed to his injury, or it will not preclude his recovery. The doctrine expressed by Mr. Justice Sanderson, in the earlier California cases, is in harmony with the decisions of some of the other states. Gonzales v. N. Y. & H. R. R. Co., 38 N. Y. 441; Artz v. C. R. I. & P. R. R. Co., 38 Iowa, 293: Johnson v. Tillson, 36 Iowa, 89; Hurch v. C. R. R. Co., 9 Foster, 9; Kellogg v. Steamboat, 19 La. Ann. 304. But the conclusion now announced in the Fernandez case is better supported by the authorities. Wharton on Negligence, secs. 326 to 331. A. C. F.

BOND SIGNED ON CONDITION.

STATE OF MISSOURI v. POTTER.

Supreme Court of Missouri, October Term, 1876.

HON. DAVID WAGNER, Chief Justice.
" T. A. SHERWOOD, }
" W. B. NAPTON, } Judges.
" WARWICK HOUGH, }
" E. H. NORTON, }

1. CURATOR'S BOND—CONDITIONAL SIGNING.—A curator's bond, perfect on its face, can not be avoided at the instance of a surety, upon the ground that he signed it under a conditional agreement, made with his principal, that the latter was not to deliver it until the signature of a certain person was also obtained, although in violation of such agreement the bond was delivered.

2. BOND — CONTEMPORANEOUS PAROL AGREEMENT.—Testimony concerning a contemporaneous parol agreement is always objectionable, but in instances like the present, doubly obnoxious, where the agreement is kept sedulously concealed from the other contracting party.

3. ESTOPPEL.—In such cases, the doctrine of estoppel *in pais* is fully applicable, and effectually precludes the surety from asserting anything to the contrary of that denoted by the face of the bond.

4. PUBLIC POLICY—PATRIMONY OF ORPHANS. — Public policy forbids that a surety, in cases of this sort, should defend and defeat an action brought in the bond; because it concerns the state that the patrimony of orphans, confided to the protection of her courts, should not suffer loss.

ERROR to Pettis Circuit Court.

SHERWOOD, J., delivered the opinion of the court:

We are to determine whether a curator's bond, regular in form, can be avoided at the instance of a surety, upon the ground that he had signed it under a conditional agreement, made at the time with the principal, that the latter was not to deliver the bond until the signature of a certain person had also been obtained, and that, notwithstanding such agreement, and in violation of it, the bond was delivered.

The question has been one prolific of litigation, and the conclusions reached by different tribunals have frequently exhibited no inconsiderable lack of uniformity. But it is thought that many decisions which, at first blush, appear incapable of being harmonized, will be found, on more narrow examination of the controlling facts incident to each, to bear a closer resemblance than casual observation would, at the outset, lead us to suppose. In intimate connection with the subject under discussion, we are asked to review some of our former decisions, in order that it may be ascertained whether they will bear the test of a closer and more deliberate examination than heretofore bestowed; an examination commensurate, both with the importance of the topic involved, and with the greater facilities now afforded for such investigation, in consequence of recent and elaborate adjudications, some of which were not accessible, or else were overlooked, at the time our own, now sought to be re-examined, were rendered.

In the case of the State v. Sandusky, 46 Mo. 377, the point in hand was not involved; there were neither the proper averments in the answer, in respect of a conditional delivery of the bond; nor, if there had been such averments, was there any evidence adduced which could have been offered in their support; "the only real defense" was a denial, by the defendant, of his signature. Any remarks, therefore, in that case, relative to the matter now before us, can not be held as possessing authoritative value. And the same may be said of Cutter v. Whittemore, 10 Mass. 442, referred to in the case just cited. So far as Gasconade County v. Sanders, 49 Mo., 192, has relevancy to the present case, it is an authority favoring the position of the beneficiaries in this action; for the point is there conceded in argument, that, "where the principal in a a bond, or other person not acting as the agent of the creditor, fraudulently procures the names of sureties to a bond, and the creditor takes the bond and loans his money without any knowledge of the fraud practiced on the sureties, he can not be made to suffer by such fraud. Their remedy is against the party who defrauded them, and not against the creditor;" and the judgment of the trial-court was reversed, because of failure to recognize the validity of the defense, that the defendant's signature was procured by the fraud and forgery of the *agent* of the county. Linn County and State to use, etc., v. Farris, 52 Mo. 75, gives full recognition to the doctrine of the condition or delivery of a bond by one conditional obligor to another, and of invalidity of such delivery, when violative of previously imposed conditions. From the meager statement, it does not appear whether or not the officer who received the bond was cognizant of the facts afterward relied on as a defense. There, however, the name of one of the apparent sureties was forged; but in the line of remark pursued in the opinion, no particular stress is laid on the forgery, only so far as its existence showed a failure of compliance with antecedent requirements; and the decision is altogether based on the idea that, in consequence of the terms imposed by the surety not having met with performance, no valid execution of the bond had occurred, although, curiously enough, a remark of similar import to that already quoted from Gasconade County v. Sanders, is indulged in. Now, if these *episodal observations* assert the true rule in relation to the rights of an ordinary creditor, who is not aware of, nor a participant in, the fraud practiced by the principal on his surety, would it not seem to follow that a like rule should prevail where, under similar circumstances, the officer appointed for that purpose is the recipient of either an official bond or of one for the direct payment of money? May it not be asked, with much pertinence, wherein the attitude of the county or state differs from that of a private individual in this regard, and may not those who assert the existence of an attitudinal difference in this respect, be called on to establish, by something more than mere assertion, why the creditor should not "be made to suffer by such fraud" on the one hand, while the county or state is "made to suffer" on the other?

In Ayers v. Milroy, 53 Mo. 516, a division of opinion occurred as to the method pursued in the discussion of that case, the majority opinion proceeding on the theory of conditional delivery to a co-obligor, while that of the minority concurs in the result upon the peculiar facts. There the suit was on a non-negotiable note, signed by the surety on the express condition, which was not complied with by the principal, that he would obtain the signature of another surety, before delivering the note to the creditor. And it was held that these

facts constituted a valid defense, and that the same rule was applicable to all instruments, not negotiable, whether notes or bonds. The conclusion reached was a correct one, whatever may be thought of the reasons on which it was based; for it was conceded throughout the whole case, that the plaintiff was apprised of the condition on which the surety was to be bound. Knowing this, the plaintiff acted in bad faith in his acceptance of the note, and therefore should have been denied a recovery on that ground alone, regardless of other considerations; and this last ground was the one which induced the concurrence of those who, disapproving of the reasoning employed, joined in the approval of the result. In both of the two preceding decisions, it will be observed that the sole basis of the ruling is a lack of power in the co-obligor to make the delivery of the instrument in question. Other authorities, relied on by defendant as sustaining the action of the court below, will now be noticed, including those on which the cases just cited were based.

Pawling v. United States, 4 Cranch, 219, is to the effect that, if a surety signs an official bond, and delivers it to his principal, on condition that others, *whose names were inserted in the body of the bond*, should also sign it, this delivery of the bond only made it an *escrow*, and if the requisite signatures were not obtained, that the surety was not bound. In Duncan v. United States, 7 Pet. 435, the bond also lacked completeness in a similar manner. It does not appear whether there was any defect, or irregularity in the bond in suit, in the case of the United States v. Leffler, 11 Pet. 86, and the only point considered was as to the competency of certain witnesses, respecting the conditional execution of the bond. The circumstances under which the evidence was held competent are not set forth; and, in all probability, the facts were like those of Pawling v. United States, *supra*, and it was controlled by that decision. Seely v. People, 27 Ill. 173, holds, that where a party signs his name to a bond as co-surety with another, and such other's signature had been forged, the surety, supposing the signature to be genuine, will not be liable. But the case also, *arguendo*, condemns in pointed terms the doctrine which it is cited as upholding, and evidently proceeds upon the theory, that to the surety not the slightest negligence was attributable. In Leaf v. Gibbs, 4. C. and P. 466, the surety was to sign, upon condition that his mother should do the same; but she refused, and, as the plaintiffs were informed of the terms on which the son's signature was obtained, he was held not liable, unless, knowing the facts, he had waived the objection. Perry v. Patterson, 5 Humph. 133, was, in its salient features, similar to the one just mentioned. A compromise was effected between a debtor and the attorney of his creditor, whereby it was agreed that two sureties should sign a note with the debtor, and that this note, when signed by sureties who were named and agreed to be received, should be accepted, and operate as a stay, for twelve months, of the judgment, for the amount of which the note was to be given. A blank note was accordingly prepared with *three* seals, which was signed by one of the sureties, on condition that the other intended surety should sign also. This the latter refused; but the attorney to whom the note had been delivered by the principal, never received the note in payment of the judgment, as he still insisted on having the two sureties, as per agreement. And, besides, the note was not delivered to the attorney in execution of the agreement, "but merely lodged with him, till such time as the surety could be induced to sign it." So that the note was incomplete; it was never delivered, and the attorney with whom it was "merely lodged," knew all about the attending facts. The head-notes of this decision are inaccurate, and well calculated to mislead; there was no "ignorance of the creditor" of the circumstances, unless the *knowledge* of the attorney is to be deemed the *ignorance* of his employer. The remarks, therefore, as to the effect of the creditor's ignorance, are wholly outside of the case, since the proof shows nothing of the sort. Carter v. McClintock, 29 Mo. 464, simply declares that no delivery of a note occurs where the payee surreptitiously obtains possession thereof, and that he can not maintain an action thereon. Pidcock v. Bishop, 3 Barn. and Cress. 605, holds merely that, where a creditor and his debtor have made a secret arrangement which, without the knowledge of the surety, increased his responsibility, this was a fraudulent concealment, of which the creditor could not take advantage, and which accomplished the surety's exoneration.

The gist of the decision in Lloyd v. Howard, 1 Eng. L. and Eq. 227, is that, if a bill of exchange be delivered by A to B for a specific purpose, which the latter does not accomplish, but retains the bill till *overdue*, and then delivers it to C without value, C is not a *bona fide* holder, and can not maintain an action against A as indorser. Palmer v. Richards, in the same vol. p. 529, was based on a different state of facts. The bill was indorsed by A in order to have it discontinued, and delivered to B for that purpose, who applied it to his own purposes, by depositing it prior to maturity, as a security for money advanced, and held that the indorsement of A bound him. Awde v. Dixon, 5 Eng. L. and Eq. 512, seems to establish that, if a blank in a negotiable note be (contrary to a previous stipulation with a surety, that another surety shall sign before delivery), filled with the name of the party as payee, who advances the money on it, the surety is not bound. The note there, however, would appear to have been incomplete, as a blank space was left where the intended surety was to sign. But if this circumstance was not taken into account, the decision is clearly contrary to the decisions of this court, and of other American tribunals. 1 Pars. N & B. 111, and cases cited. 10 Jur. N. S. is not accessible; but if we may rely on a report of the case of Swan v. Australasian Co., *Id.* 102, the facts were substantially these: A was induced by his broker to send him blank forms of transfer, which the broker filled up with numbers and descriptions of shares different from those of the company intended by A, being shares in the defendant's company, and by means of a duplicate key, which he had procured to be made without the knowedge of A, obtained certificates from a box of A's necessary to perfect the transfer, and also forged the names of the attesting witnesses; and held, in action against the company for damages, and for a mandamus to restore the plaintiff's name to the registry, that the acts of the plaintiff were not such as estopped him from showing that the deed of transfer was a forgery. In short, the ruling goes only so far as to assert that the combined acts of larceny and forgery, on the part of the agent, did not estop the plaintiff from the assertion of his rights; and it would have been strange, indeed, had the ruling been otherwise, since it is plain to see that merely trusting blank forms of transfer to the agent did not enable him to perpetrate a fraud upon a third party, but, in addition thereto, required a contemporaneous conjunction of *two crimes*, in order to the fraud's consummation.

In Preston v. Hull, 23 Gratt. 600, the bond was incomplete on its face, lacking the name of the payee, and the single point decided was, that parol authority would not authorize any one to fill the blank left, in the absence of the principal. Johnson v. Baker, 4 B. and Ald. 440, shows the instrument, a composition-deed, to have been incomplete when delivered to one of the creditors to procure the signatures of the others therein named. Fletcher v. Austin, 11 Vt. 447, discusses the point of delivery; but there the bond dis-

played its own incompleteness in the lack of signatures corresponding with the names inserted in its body, and there the court expressly says: "If the bond contains the names of other obligors, and is delivered without the signatures of all, the obligee must inquire whether those who have signed consent to its being delivered without the signatures of the others." Now, if the duty of inquiry on the part of the obligee has its origin in palpable omissions in the bond, would it not seem to follow, with conclusiveness, that no inquiry is requisite where no defect exists? The bond mentioned in State Bank v. Evans, 3 Greene, N. J. 155, was incomplete, in that it lacked the signature of Olden, one of the named obligors. In Lovett v. Adams, 3 Wend. 380, the only point in judgment was the propriety of the rejection of two co-obligors as witnesses; but the occasion was improved to the discussion of other points. Besides, the report of the case clearly shows that *nine* sureties signed a bond for the payment of a certain sum of money, and sent the bond to be delivered to the plaintiffs on condition that previously arranged terms were complied with, whereby such sureties would be indemnified against the risk incident to their suretyship. The plaintiffs refused acceptance of these terms, and subsequently, by a new and different arrangement, entered into with *five* of the obligators (without the knowledge or consent of the remaining *four*), accepted the bond and then brought suit, not against the *five* who had, but against the *four* who had not consented to such an arrangement. In Bronson v. Noyes, 7 Wend. 188, the sheriff, the recipient of the bond, was cognizant of the conditions upon which the surety signed, and in effect promised that those conditions should either meet with compliance, or else bail should be procured. In Herdman v. Bratten, 2 Harrington, 396, the bond was plainly incomplete. That case was decided, however, on another point—the alteration of the bond, by the erasure of certain names which were in the body of the bond, at the time the signing in question occurred; and, moreover, the sheriff, to whom the replevin bond was executed, was apprised of the express condition on which the surety signed, and afterwards, it seems, erased the names of those whose signatures he was to procure. In Bibb v. Reid, 3 Ala. 88, the administrator's bond was lacking in nothing, and it was held that it was capable of delivery to a co-obligor as an *escrow*, and was invalid unless on performance of conditions; and some of the same authorities already examined were cited in support of the position.

The People v. Bostwick, 32 N. Y. 445, is based on a portion of the authorities heretofore noticed. There was no infirmity patent on the face of the bond, and the case was discussed on the theory both of the delivery of the bond to a co-obligor as an *escrow*, to await the fulfillment of prior requirements, and on that of estoppel, and the conclusion reached favoring the former view and relying on it, and opposed to the latter.

A result, diametrically opposed to the one just announced, has been reached in Indiana, where, after an exhaustive examination and discussion of the authorities, it is held, not only that one surety is incapable of delivering a bond or other instrument of like nature to his co-obligor, as an *escrow*, but that the surety was bound, regardless of the giving or disobedience of secret instructions, if the instrument was perfect on its face, and the co-obligor clothed thereby with apparent authority to deliver it. And the case of Pepper v. State, 22 Ind. 399, has been expressly overruled in Pepper v. State, 31 Ind. 76, where the cause came the second time before the supreme court. Similar rulings had been also made in Deardorff v. Foresman, 24 Ind. 481; Blackwell v. State, 26 Ind. 204, and Webb v. Baird, 27 Ind. 368.

Bagot v. State, 33 Ind. 262, does not militate against these rulings, though the case is very loosely and obscurely reported, and a great deal of unnecessary matter introduced. The substance of the case, and of the point in judgment, is this: That parol authority is insufficient to authorize one having no connection with an official bond to sign the name of a third person to such bond, unless the signing takes place in the presence of him giving the verbal authority. The opinion was delivered by Fraser, J., who was on the bench with Ray and Gregory. JJ., when all the cases subsequent to Pepper v. State were decided, and who had delivered an emphatic opinion on petition for rehearing in State v. Pepper, in which he explicitly concurred with his associates in upholding the doctrine announced by them in 24, 26 and 27 Ind., *supra*, and who were still his associates when Bagot v. State was decided. Under these circumstances, the assumption is a very bold one that the judge who delivered the decision in the case last cited, or those who concurred with him therein, intended to announce any doctrine variant from their prior conclusions. The rule thus enunciated is this: "That, where the surety places the instrument, perfect upon its face, in the hands of the proper person, to pass it to the obligee, the law justly holds that the apparent authority with which the surety has clothed him shall be regarded as the real authority; and, as the condition imposed upon the delivery was unknown to the obligee, therefore, the benefit of such condition shall not avail the surety." And, to use the language of Fraser, J., in delivering the opinion of the court on motion for re-argument in State v. Pepper, "the subject had been examined by all the judges in consultation, to the extent of a critical inspection (to a considerable extent repeated) of the cases cited, and of those referred to by all other courts, as supporting the ruling of this court in this cause when formerly here. The result has been, not only a clear conviction on the part of the whole bench, as expressed in the opinion in this and the Deardorff case, but also a wonder how, upon a thorough examination of the subject, any other conclusion could be arrived at."

It has doubtless been observed that, in nearly all the cases relied on by defendant, of which I have given the gist, the judicial utterances were mere *obiter dicta*, or else, there was something apparent on the face of the bond evincing incompletion, or some attendant circumstance showing knowledge, or its equivalent, on the part of the recipient of the bond or other instrument, that its delivery was not to occur, except other signatures were first obtained, or other antecedent acts done of equal importance. This is true of every case instanced from other states, except that of People v. Bostwick, and Bibb v. Reid, *supra*, the latter of which discusses only, and very briefly, the question of conditional delivery by one co-obligor to another; and that is the ground whereon the decision in People v. Bostwick is chiefly based; and our own adjudications, as above seen, are exclusively based on that ground.

Did we care to press the point, it might not, perhaps, in a manner at all consonant with rudimentary definitions, be easy to explain how an instrument could be deemed an *escrow* unless delivered as such to a third person; nor how, if an *escrow*, it could be incomplete. But we are content to waive the point, since it is not plainly necessary to the proper disposal of this case, being desirous of placing that case on broader grounds than those incident to a narrow technicality.

An estoppel *in pais* is said to arise when an act is done, or statement made, by a party, which can not be contradicted without fraud on his part, and injury to others, whose conduct has been influenced by the act or admission. Lickbarrow v. Mason, 2 T. Rep. 63, 70. Here, the surety, who defends this action, had invested the principal with an apparent authority to

deliver the bond, and there was nothing on the face of the bond, or in any of the attending circumstances, to apprise the official who accepted it, that there was any secret agreement which should preclude the acceptance of the bond, and the surety is alone in fault in the matter, as, but for his unwarranted trust in Turley, the latter would never have had it in his power to occasion the loss which the beneficiaries of this bond must suffer, if the defence made by the surety is successful. Surely, then, a more opportune application of the language of Lord Holt, in Hern v. Nichols, 1 Salk. 289, could not occur, than to the case before us, that, "*seeing that somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser, than a stranger.*" If the doctrine of estoppel would not apply here, might not the significant query well be asked: To what state of facts would it apply?

Now, the rule is well settled that, if I stand by, and without objection see another dispose of my property, I can not be afterward heard to assert ownership in it; and this in accordance with the maxim: "That he who did not speak when he should have spoken, shall not be heard now that he should be silent." In such instances the question of power to make the sale and pass the title, is one not worthy of a moment's consideration. The only proper inquiry is: Did I, by my silence, give the purchaser reason to infer that his vendor had the right to dispose of the property? If so, then, upon every principle of fair dealing, the true basis of such estoppels, I am estopped to assert anything to the contrary of what my silence might naturally be inferred to indicate, and the hypothetical case is by no means stronger than the real one under discussion. For the officer, to whom was committed the duty of taking the bond, had literally conformed to that duty, by the acceptance of an instrument, perfect in every particular, and emanating from the proper custody; and he had, therefore, the right to infer, and it was the defendant's conduct which gave origin to this reasonable inference, that the delivery of the bond was in conformity to the usual course of such transactions.

A stronger case of estoppel could not well be conceived than this, where a surety, after standing by for years, and allowing the patrimony of orphans to be squandered, now steps in, at this late day, and asserts that, owing to a hitherto undisclosed arrangement, he, although *apparently* bound for any default of his principal, was not, *in fact*, bound. This subject of estoppels, and under what circumstances they arise, considered with reference to bonds, has recently undergone discussion in the National Supreme Court, and the same result been reached as above; and the ruling made in Pawling v. United States, which is the basis of all subsequent kindred decisions in this country, is explained on grounds entirely satisfactory, and similar to those already adverted to. Dair v. United States, 16 Wall. 1. To the same effect are exhaustive and elaborate discussions in Virginia and Maine. State v. Peck, 53 Me. 284; Nash v. Fugate, 24 Gratt. 202.

But there are other elements which also enter into a proper consideration of this cause, and which, on that account, should not be ignored. Are not sureties sufficiently solicitous about escaping from what they regarded, when signing, as remotely contingent possibilities, without opening new avenues to facilitate their eager escape? And would it not be acting in flagrant violation of one of the most familiar rules of evidence, and of the very spirit of the law itself, to permit formally executed securities to be annulled by testimony of some contemporaneous parol agreement? If, under ordinary circumstances, such testimony would be objectionable, would it not be doubly obnoxious in cases like this one, where the agreement is kept sedulously concealed from the other contracting party? There is but one answer—an emphatic affirmative—that can be returned to these questions.

Again, it concerns the state, that the heritage of the helpless, confided to the protection of her courts, should not suffer detriment. The consequences would be fraught with disaster, and it would be subversive of the plainest dictates of public policy, if sureties in such cases were permitted, by means of some "ill-remembered conversation," or some occult understanding, never disclosed but under the shadow of impending loss, to escape liabilities which their own solemn deed and recorded specialty announces them to have incurred.

These reasons appear to us conclusive that the following declaration of law asked by plaintiff, should have been given: "Although the court may believe, from the evidence, that the defendant, Jabez H. Potter, may, at the time of his signing the bond sued on, have had the agreement with James M. Turley, the principal in said bond, that said Turley was not to file said bond, or deliver the same, until Wm. E. Bothrick also executed said bond as surety; yet, if said bond was afterwards, in violation of said agreement, filed by said Turley, in the County Court of Pettis County, Missouri, and was approved by said court, and said bond was, when so filed and approved, complete and regular upon its face, and the officers of said court had no notice of said agreement between said Turley and said Potter, then such agreement constitutes no defense to this suit, and the court must find for the plaintiff," and that the one of a contrary effect should have been refused.

In so far as our former decisions are in opposition to this view, they are overruled. Judgment reversed, and cause remanded. Judge Wagner absent; Judges Napton and Hough concur.

NOTE.—There seems to be a growing disposition in the courts of this country to extend the doctrine of estoppels *in pais* considerably beyond its original scope, in its application to both negotiable and non-negotiable instruments. In this movement the Supreme Court of the United States has taken and maintained the lead, many of the state courts following very reluctantly. The statement of this doctrine in the foregoing opinion is, certainly, conservative enough to meet the approbation of the most old-fashioned lawyer. The language of the court is: "An estoppel *in pais* is said to arise when an act is done, or statement made, by a party, which can not be contradicted *without fraud on his part*, and injury to others, whose conduct has been influenced by the act or admission." Such is, we believe, the present, as well as the ancient, English doctrine. The application of this rule, however, to the facts of the foregoing case, is not so clearly obvious. The plea of the surety did not involve an admission of fraud on his part; at most, he was guiltly of negligence merely. It does not appear that he knew that the bond had been delivered by his principal until suit was brought. If, knowing that the bond had been delivered in violation of the condition imposed by him, the surety had stood silently by and permitted obligations to be incurred on the faith of it, the estoppel would be unquestionable.

The famous remark of Lord Holt, that, "seeing that somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver, should be a loser than a stranger," is, doubtless, a very well established and a very just rule; but it does not settle much here, for the reason that the main controversy is, whether the surety did employ and put trust in his principal, and whether the party to whom the instrument was delivered, was under any obligation to see that the instrument had been properly executed. The party to whom a non-negotiable instrument is delivered, must, of course, accept it, believing that the party delivering it was authorized to do so; if that belief is a mistaken one, he is deceived by one in whom he put confidence, and, according to the rule, must suffer the consequences of his misplaced confidence. The rule is not valuable in such a case

as this, for the reason that it will work equally well both ways.

The real inquiry, it seems to us, is, *first*, was it the duty of the surety to see to it that the instrument was not delivered in violation of the condition upon which he signed it; *second*, was it the duty of the obligee or party accepting the obligation, to ascertain that it had been duly executed. If the first inquiry is answered in the affirmative and the latter in the negative, it would seem that the surety ought to be held; otherwise not. If the obligee neglected his duty, if he failed to make an inquiry that the law required him to make at his peril, no amount of negligence on the part of the surety, concurring therewith, would make him liable.

On this point we can not better state the position of those who maintain that it is the duty of the obligee to see that the obligation is properly executed, than in the language of Judge Redfield, in a note to Ins. Co. v. Brooks, 3 Am. Law Reg. (N. S.) 402: "We confess a strong inclination, in questions affecting specialties and simple contracts not negotiable, to favor the English rule. It seems to us that too many of the American cases, in striving to require good faith and diligence of the obligor or promisor, have quite too much overlooked the corresponding obligations on the part of the obligee. We can see no good reason why the obligee who, in accepting the bond, trusts to the representations of the principal obligor as to the execution of the instrument by the others, who are known to stand as mere sureties, should be any more entitled to screen himself from the consequences of those representations proving false, than should the obligor. The true rule in such case seems to be that each party may stand upon *the facts of the case*, unless he has been guilty of *fraudulent misconduct*. This is certainly the present English rule upon the subject, and the one which, we believe, will ultimately prevail in this country." A portion of this note was cited in Deardorff v. Foresman, 24 Ind. 481, as supporting a contrary rule; but the learned judge who delivered the opinion in that case, evidently overlooked the distinction made by Judge Redfield between a case where one "signs a bond as surety, upon the assurance of his principal that he shall also have other responsible co-sureties which are never procured, and the bond nevertheless delivered," where he admitted that the surety would be liable, and a case where the bond was placed in the hands of the principal as an incomplete instrument, and on the express condition that it should not become operative until completed; in which latter case, he inclined to the opinion that the surety ought not to be held, although he admitted that a majority of the American decisions were adverse to that view.

A well-established principle of the law of agency, that he who clothes another with apparent authority to do a given act, will not be heard to say that, in doing such act, his agent exceeded his authority, is sometimes invoked against a surety in such case as that under consideration; but the rule does not solve the difficulty because it still remains to be determined, whether the surety did confer any authority from which the right to deliver the bond could be reasonably inferred. If the agency was limited and special, the party dealing with the agent was bound to inquire into its extent; and in any event he must ascertain that the principal gave some authority, which, by implication, authorized the agent to do the act relied upon. But we do not think the rules governing an ordinary agency can be properly applied to such a case. One can not be said to be the agent of another when he is acting in his own affairs; he can not be both principal and agent in respect to the same act, where, as in the case of principal and surety, his interests are, to a certain extent, adverse to those of the party for whom he assumes to act. Ordinarily an agent must be a disinterested third party. Where the interests of the agent and his principal are known to be adverse, very little can safely be left to implication to warrant the doing of a particular act by the agent for the principal. In such a case, all the parties should deal with the agent at arm's length.

In regard to the strictures made in the principal case upon some of the cases cited therein, it may be said that while, doubtless, many of them might have been decided upon other grounds, involving special distinctions, the courts did not see fit to do so, and it can not fairly be said that what was laid down in those cases, in regard to the general rule involved in the principal case, was *obiter dictum*. It is true, however, that an opinion which makes close and careful distinctions, is ordinarily entitled to more weight than one written on the broad-gauge and with little apparent discrimination.

In addition to the authorities cited in the principal case, see the note to Keith v. Goodwin, Redf. & Big. Lead. Cas. on Bills and Notes, 603, where the cases are very fully collected and reviewed. M. A. L.

LIFE INSURANCE—PUBLIC POLICY.

HATCH v. MUTUAL LIFE INS. CO.

Supreme Judicial Court of Massachusetts.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" CHARLES DEVENS, JR.,
" OTIS P. LORD,

Where death resulted from an illegal operation voluntarily submitted to by insured to produce abortion, *held*, that public policy would preclude the company from insuring against the consequences of such an act, and no recovery could be had.

Henry W. Bragg, for plaintiff; *Dwight Foster*, for defendant.

ENDICOTT, J., delivered the opinion of the court:

It appears, by the bill of exceptions, that the deceased voluntarily submitted herself to an illegal operation with intent to cause an abortion, without any justifiable medical reason; that the operation performed upon her was dangerous to life, and known by her to be so; and that a miscarriage was effected by the operation, from the consequences of which she died. It is therefore established that this voluntary act on her part, condemned alike by the laws of nature and the laws of all civilized states, and known by her to be dangerous to life, did actually result in death. And the question is raised, whether, for a death so caused, any recovery can be had. We are of opinion that no recovery can be had in this case, because the act on the part of the assured, causing death, was of such a character that public policy would preclude the defendant from insuring her against its consequences. For we can have no question that a contract to insure a woman against the risk of her dying under, or in consequence of, an illegal operation for abortion, would be contrary to public policy, and could not be enforced in the courts of this commonwealth. See Amicable Ins Co. v. Bolland, 4 Bligh. 194; How v. Anglo-Australian L. Ins. Co. 30 L. J. Ch. 511; Moore v. Woolsey, 4 E. & B., 243.

It is, therefore, unnecessary to consider the questions raised upon the special clause of this policy, and so ably argued at the bar. Exceptions sustained.

SUNDAY CONTRACTS—DEMURRER.

JOHNS v. BAILEY *ET AL.*

Supreme Court of Iowa, December Term, 1876.

HON. WM. H. SEEVERS, Chief Justice.
" JAMES G. DAY,
" JAMES H. ROTHROCK, } Judges.
" JOSEPH M. BECK,
" AUSTIN ADAMS,

1. CONTRACT EXECUTED ON SUNDAY—BONA FIDE ASSIGNEE.—Although a contract executed on Sunday is of no effect between the parties, it may be transferred, and if the assignee took no part in its inception, and had no notice of its turpitude, he will be protected.

2. ESTOPPEL.—Where the plaintiff caused a contract executed on Sunday to be dated as of a secular day, *held*,

that he was thereby estopped from denying its validity.

3. EFFECT OF DEMURRER.—Plaintiff, in his petition, sought to recover certain lands as the holder of the legal title. Defendant pleaded a contract made by plaintiff to another for said lands. Reply, that said contract was executed on Sunday. *Held*, that a demurrer to plaintiff's reply would not raise the question as to the validity of the contract.

APPEAL from Grundy Circuit Court.

Plaintiff brought this action at law, seeking to recover a tract of land, described in his petition, upon the claim of holding the fee simple title thereto. The defendants deny plaintiff's right to the land, and in their answer show that he had sold it to Mary Skeels, and executed a writing witnessing the sale, and obligating him to convey the land to her; that possession of the land was taken under this contract by Mary Skeels, and valuable improvements made thereon, and, afterwards, she sold and transferred all her right and interest under the contract to defendants. The contract of sale and assignment thereof are as follows:

"Know all men by these presents: That I, Henry Johns, of Grundy county, Iowa, have this day bargained and sold unto Mary Skeels, of Grundy county, Iowa, the northwest quarter of the southeast quarter of section 32, township 88, range 17. The said Henry Johns holds said premises by virtue of a tax-deed, and it is the tax-title that is intended to be sold to said Mary Skeels. It is agreed that said Mary Skeels is to pay all taxes after this date. The price agreed upon for the purchase of said tax-title is as follows: The said Mary Skeels is to deliver five hundred bushels of good wheat at the residence of Henry Johns, in Shiloh township, Grundy county, Iowa; one hundred bushels of wheat, yearly, until said five hundred bushels of wheat is delivered. Now, if said wheat is delivered as agreed, and the taxes are paid as agreed, then Henry Johns will make and deliver to said Mary Skeels a quit-claim deed of said premises unto Mary Skeels.

"December 21, 1874. HENRY JOHNS."

"COLFAX, GRUNDY COUNTY, IOWA, May 20, 1875.

"For, and in consideration of, one hundred dollars, to me in hand paid by Bailey and Strevell, of Stevenson county, Illinois, the receipt of which is hereby acknowledged, I hereby sell, transfer and set over to said Bailey and Strevell, all my right, title and interest to the within contract; also, all the improvements thereon, including house, stable, and all other improvements.

"MARY SKEELS,

"Witness: JAS. RAYMOND. CHAS. SKEELS."

It is further alleged in the answer, that defendants entered upon the land under the transfer from Mary Skeels, which was for value. They make their answer a cross-petition, and ask that the cause be transferred to the equity side of the court, and that they be adjudged to hold rightful possession of the property, etc. In reply to this answer, plaintiff sets up that the contract under which defendants claim the land, as assignees of Mary Skeels, was executed and delivered upon Sunday, and never ratified by him, and is, therefore, of no effect.

Upon a trial on the merits, a decree was entered for plaintiff, confirming his title and awarding him possession of the land. Defendants appeal. Other facts of the case, necessary to an understanding of the decision of the court, appear in the opinion.

Huff & Reed, for appellants; *William V. Allen*, for appellee.

BECK, J., delivered the opinion of the court:

I. The decision of this cause turns wholly upon the sufficiency of the contract of sale and obligation to convey the land, executed by plaintiff. There is no dispute as to the title held by him, and the sufficiency of the assignment by Mary Skeels, to transfer her interest and right to defendants, is not questioned. We are required to do nothing more than to determine whether the contract of plaintiff, in the hands of defendants, can be enforced. The evidence conclusively shows that Mary Skeels and her husband took and held possession of the land under the contract, and that the instrument was executed and delivered on Sunday. It bears date, however, of another day. The defendants, about five months after the execution of the contract, purchased Mrs. Skeels' interest in the land, paying her a sufficient consideration, and immediately entered into possession of the land. They had no notice of the fact that the contract was made on Sunday.

We are to determine whether, under these facts, defendants acquired the interest in, and the right to, the lands which the interest in question purports to transfer. It has been repeatedly held by this court that a contract executed on Sunday, as between the parties, is of no effect, and will not be enforced by the courts of this state. The decisions are based upon the principle that contracts, in violation of law, are without binding force; the parties thereto, being *in delicto*, can claim no rights under them. Secular employment is forbidden on Sunday by the laws of this state; contracts, therefore, can not be entered into on that day without a violation of law, and can not be enforced. The ground of the principle upon which such a contract is pronounced invalid, is the violation of the law by the parties thereto. It is *causa turpis*. The parties to the contract are *participes criminis*, and are *in pari delicto;* neither can enforce the contract, for both are violators of the law.

A contract made on Sunday is not a nullity. If for labor which is performed on another day by one party, the other can not set up its turpitude to defeat an action thereon against him. Meriwether v. Smith, 44 Ga. 541. It is not wholly inoperative; for, when executed, no relief will be granted to either party. Myers v. Meinrath, 101 Mass. 366. When such a contract is spoken of as being void, the language is understood to mean voidable—that is, it may be defeated, can not be enforced by action. See Pike v. King, 16 Ia. 49; Adams v. Gay, 19 Vt. 358.

We know of no reason why a written contract, made on Sunday, may not be transferred by proper writing. Surely, such a transfer would be valid between the parties thereto. If the contract is not a nullity, it may be transferred. When transferred, what are the rights of the parties? If the assignee took no part in the inception of the contract, and had no notice of its turpitude, he did not violate the law forbidding the execution of the instrument. He is not *particeps criminis* with the obligor. The rule, *ex turpi causa non oritur actio*, will not avail to protect a wrong-doer against an innocent party, whose rights have been acquired without notice of the violation of law. Quirk v. Thomas, 6 Mich. 76. The courts will afford relief where parties to an illegal contract are not *in pari delicto*. Schermerhorn v. Talman, 14 N. Y. 93; Tracy v. Talmage, *Id.* 162; Quirk v. Thomas, *supra*. In order to defeat a contract made on Sunday, it must be shown that the party seeking to enforce it had some voluntary agency in consummating the contract on that day. Sargeant v. Butts, 21 Vt. 99.

II. In the case before us, the plaintiff caused the contract to be dated as though it had been executed on a secular day. By this act the defendants may have been misled, and induced to believe that the defence now made to the contract did not, in fact, exist. While giving all the appearance of legality to his contract, plaintiff can not set up its illegality to protect himself

against the instrument, when in the hands of a good-faith holder, without notice. He is estopped to deny the validity of the instrument, when he, by his own act, has given it such character. See Knox v. Clifford, 38 Wis. 651; Cranson v. Goss, 107 Mass. 439, and authorities cited. The foregoing views are not in conflict with any decision heretofore made by this court. They certainly accord with the rules of equity, and lead to a result approved by justice. Applying them to the case in hand, we hold that plaintiff can not set up the execution of the contract on Sunday to defeat it in the hands of defendants, who are good-faith purchasers for value, and without notice of the illegality pleaded.

III. The plaintiff insists that, as defendants did not demur to his reply to their answer, they can not now urge objection to the judgment on the ground that they are good-faith assignees of the contract without notice.

Without determining the effect of a failure to demur in a proper case, it is a sufficient answer to the objection to say that a demurrer to plaintiff's reply would not have raised the question involving the validity of the contract in the hands of defendants, which we have discussed, and upon which their rights depend. Defendants, therefore, could not have demurred to the plaintiff's answer. This will plainly appear from a brief statement of the pleadings. The petition claims to recover upon the legal title held by plaintiff; the answer sets up the contract, and thereon claims that the equitable title is in defendants; the reply alleges simply that the contract was made on Sunday, and was never ratified by plaintiff, and denies the allegations of the answer. A demurrer to the reply would have admitted the facts pleaded therein, and no others. The assignment to defendants of the contract, for value and without notice, was not set up in the reply, but was denied therein. It would not have been taken as admitted by the court in passing upon the demurrer; for the court would not have looked to prior or subsequent pleading for facts admitted, nor considered facts not pleaded, as admitted, in rendering judgment on the demurrer. The facts alleged by the reply only would have stood as admitted. These did not include the assignment of the contract in good faith and for value, and without notice, the very gist of defendant's case.

IV. The action was commenced before the time fixed for payment by the contract. Defendants do not ask that the contract be specifically enforced by a decree requiring plaintiff to execute a deed for the land. The relief they ask is, that they may be secured in the possession of the land which they acquired and hold under the contract. To this relief they are entitled. Their right to a conveyance of the land will depend upon their performance of the contract, in making the payments stipulated therein.

A decree will, at the option of defendants, be entered in this court, dismissing plaintiff's petition and granting the relief prayed for by defendants in their answer, and declaring the contract under which they claim valid and binding in their hands, or the cause will be remanded to the circuit court, that such a decree may be there entered. REVERSED.

CORRESPONDENCE.

OUR ERROR—STATUTE REVISION.

To the Editor of the Central Law Journal:

In your editorial in the JOURNAL of the 12th inst., inviting, as you do, the attention of the Legislature of Missouri to the propriety of an amendment of the statute of this state, relative to the requirement imposed upon railroad corporations, to fence their roads (W. S. 310, § 43), you have fallen into a serious error in supposing, as you do, that the law, as it now stands, only requires the fences to be erected on the sides of the road, "where the same passes through, along or adjoining enclosed or cultivated fields, or unenclosed prairie lands." The law stood thus until the decision in the case of Tiarks v. St. L. & I. M. R. R. Co., 58 Mo. 46, imposed upon the statute a construction, which left the owner remediless, as to double damages for his stock, injured or killed, not only where the road passed through timber land, but also where it passed through land from which all the timber had been cut, but which remained uncultivated. This decision, however, was a fair legal construction of the statute, as it then stood. The manifest injustice, however, of the law, to the owners of stock, in portions of the state where timber abounds, constrained the legislature, on the 18th of February, 1875, to so amend the statute you have cited (§ 43, W. S. p. 310) that the law was made conformable to the sentiment expressed in your editorial, viz: A liability on the part of railroad corporations was then created in this state for double damages to the owner, where stock has been injured or killed by reason of its straying upon the railroads, at any point where the same "pass through, along or adjoining enclosed or cultivated fields or *unenclosed* lands." See Laws of Mo., 1875, p. 131.

At the same session, an important amendment was also made to the act of March 18, 1874, relative to railroad crossings on public roads, in the country, as well as in towns, and also as to alarm-boards at such crossings. See Laws of Mo., 1876, p. 130. The error you have fallen into (for you are usually quite correct in your positions) suggests the propriety of a proper revision of the statutes of this state.

The legislature, now in session, has before it several bills looking to such revision. The house, with that characteristic desire to immortalize itself, which generally characterizes legislative bodies of very little legislative experience, has indicated a resolve on its part to complete, amid the daily stress of its ordinary business (which, in conforming the laws of the state to the new constitution, will be extensive), this revision, at its present session, which can not exceed one hundred and twenty days—fifteen days of which have already elapsed. Without impugning the ability of either the house or the senate (for quite a number of good lawyers are members of both bodies), it seems to me that the bar of the state should insist upon the appointment of a commission, composed of some two able, industrious, careful and painstaking lawyers, such as are, for instance, Gov. Hardin and Judge Wagner, to do this work—taking ample time to do it thoroughly—and report at the next session of the legislature the result of their labors. In this way the revision of 1845 was completed by Gov. Hardin, and the work was done with infinite completeness. The statutes of 1865 were revised by the legislature in the way it is now suggested to be done by the house, and the result was, at best, a slouchy performance. In the nature of things, it is impossible for any committee of the members of the legislature to do this work well in one hundred days, and, at the same time, discharge their duties to their constituents. What should be done, is the passage or repeal of laws, so as to make our code conform to the present constitution, and then remit the work of revision to a committee of at least two able lawyers. Judge Wagner's edition of the statutes of 1870 and 1872, is a great improvement upon the legislative edition of 1865.

The code goes into the hands of the yeomanry, and through it, as a legal guide, nearly one-half of the litigation in this state is disposed of before justices of the peace, without the aid of lawyers. To present to the

people in as clear a form as possible, to say nothing of the great aid such an addition will be to the bar and to the public officers of the state, each section of the statutes which has been construed by our Supreme Court, or where by it light is thrown upon the law, should, together with the point passed upon, be briefly cited and the obsolete and overruled cases cited in previous editions, which, with many changes since made in the law are now inapplicable as legal authorities, should be eliminated. Such an edition of the statutes as here suggested would, in my mind, be of incalculable benefit to the state, and would be of a permanent character.

I, therefore, trust you will see the propriety of calling the attention through the JOURNAL, of the bar and of the legislature to a revision of this character.

B. B. CAHOON.

FREDERICKTOWN, MO.

RAILROAD WRECKING.

To the Editor of the Central Law Journal:

Your article on the subject of Railroads, in your issue of January 5, meets a hearty response from the bar of this locality. It is matter of *public notoriety* and *public shame* that a majority of the railroads lately projected or constructed, have been so managed as to cause a total loss to all creditors coming after the first bond-holders. In many instances laborers on railroads—without whose services the roads could not be operated and no interest whatever could be paid upon the bonds—have been compelled to take "scrip" for their services. After a large amount of this "*money of the road*" has been paid out, and as much other indebtedness incurred *for the benefit of the road* as the credit and fair promises of the road can procure, the bond-holders proceed to foreclose and relieve the road from all embarrassment on account of debts due for labor, borrowed money, etc., the bond-holder getting the value thereof.

A case in point to illustrate and show the need of legislation such as you suggest, or perhaps some other: A railroad running from this city paid its employees in "scrip," the *money of the road*, until the amount held for daily labor amounted to about one hundred thousand dollars. It was also indebted largely for borrowed money. A receiver was appointed in a neighboring state, and also in this state, but not till after it was *written in the decree* that, out of the surplus earnings of the road, certain indebtedness should be paid, the first mentioned being the payment of this *scrip*. The employees having failed to get money for their labor in preserving the property of the bond-holder, used their scrip to purchase *provisions* and other necessaries of life, referring to this order, entered of record in the office of the Clerk of the United States Court, as evidence that the surplus earnings of the road were *pledged for the payment of the scrip*. The holders of the scrip filed their petition, asking that the receiver be required to pay this scrip out of any surplus earnings in his hands. The receiver answered, among other things, that a *decree* had been obtained in the other state above referred to, *subsequent* to the one on record here, disposing of the surplus earnings, one-half to go to the bond-holders for interest and the other to be applied as two trustees named in the decree, may direct, these trustees being in the interest of the bond-holders. On presentation of a certified copy of this decree, the judge in this state refused to require the payment of the scrip, upon the ground that it would be interfering with the order of the court in the other state. Thus the order of *record* here, providing for the payment of the scrip, made it circulate in the place of money. Subsequently, without notice to these parties, another order is obtained which makes it practically good-for-nothing, for the reason that the court here will not enforce its own order of record, because it would interfere with a subsequent order in another jurisdiction so distant as to deter the holders of the railroad's money from applying for an order requiring it to be recognized. The first bond-holders are in a fair way to foreclose and unload the road of its floating debt—leaving the laborer, scrip-holder, and other subsequent creditors—including all persons who have obtained judgments for stock killed by the road, for loss of limbs and loss of life by the negligence of the road, and without fault on their part—to lose it all for the benefit of the first bond-holders, who live principally in Europe. It is not very important to the capitalist, who has many thousands involved, just *where* he litigates; but the small creditor must generally litigate within the borders of his own state, or not litigate at all.

Again, by three recent decisions of the Supreme Court of this state, it has become the *settled law* that, in Indiana, the fee in the streets is *prima facie* in the abutter, and that a railroad laid thereon is an additional burden requiring compensation to the abutter. The constitution of the state prohibits the taking of private property for public use until *after* the damages are paid or tendered. The railroad above mentioned laid its track upon the property of about one hundred persons in the streets of this city. The road being in the hands of a receiver appointed by the United States Court, caused the said property-holders to apply to said court for leave to sue the receiver in the state court, which was refused. They then filed their petition in the United States Court, praying for the removal of the road, or at least that the *operation* of it be *stopped* until the constitutional provision be complied with, or their damages be assessed and tendered. This was also refused; but the court ordered the *insolvent corporation* to assess damages and allowed it to continue to operate the road in the meantime. The express terms of the Constitution require that damages shall be paid or tendered *before* property can be taken. The Supreme Court has decided that the Constitution means what it says—*before*, and not *after*. Is there any *public policy above the Constitution and the decisions of the Supreme Court?* Are we not in need of legislation by *Congress* to secure the rights of private citizens?

The above instances are given, not for their own sakes, but as examples of wrongs without practical remedies. A clear, undisputed constitutional right is unavailing with the United States Court. G.

EVANSVILLE, Ind.

BOOK NOTICES.

DASSLER'S KANSAS STATUTES. VOLUME II. The General Statutes of Kansas, being a Compilation of all the Laws of a General Nature, based upon the General Statutes of 1868 (embracing all of said Statutes still in Force), together with Subsequent Enactments, including the Session Laws of 1876, with Notes and References to Decisions. By C. F. W. DASSLER, of the Leavenworth Bar. In Two Volumes; Volume II. Containing Sections 3221 to 5789; Chapters 80 to 119. St. Louis: W. J. Gilbert. 1877.

An examination of this volume affords no ground for changing the favorable opinion expressed in a previous issue concerning the work. As a sort of preface, the publisher has given the profession his views of statute-making and statute-revision, and in his preface to the index he has given his views upon the science of indexing. The index to this work has been prepared by William G. Myer, of the St. Louis bar, a gentleman who has had much experience in this

department of labor. It is a model of brevity; too brief, we are afraid, to give satisfaction. The 1090 pages of text are indexed in the short space of twenty-six pages. When we consider that the index to the third volume of THE CENTRAL LAW JOURNAL contains, probably, four times this amount of matter, the enormous compression to which this index has been subjected will be understood.

CURIOSITIES OF THE LAW REPORTERS. By FRANKLIN FISKE HEARD. San Francisco: A. L. Bancroft & Co. 1876. pp. 212.

Whatever is quaint and curious and amusing in the reports of the Courts of Great Britain and this country, may be found embodied in Mr. Heard's beautiful volume. It is a delightful traveling companion for the lawyer. It is full of the entertaining incidents, anecdotes, and expressions, illustrating either the character of the judge, the counsel or the reporter—taken wholly from the reports and books with which the profession are familiar. Many of the things which the author has extracted from old books and cases, and set before us in such an entertaining manner, are not devoid of practical use and application. Whoever wishes, now and then, a half hour of enjoyable relaxation, will prize this collection of sketches and curious sayings.

A TREATISE ON TRIAL BY JURY. By JOHN PROFFATT, LL. B., author of "Curiosities and Law of Wills." San Francisco: Sumner, Whitney & Co. New York: Hurd and Houghton. 1877. pp. 608.

We are aware of no other work in the literature of the law in which the material learning pertaining to that distinctive feature of the common-law system of jurisprudence—the trial by jury—has been segregated from the mass of decisions and arranged in systematic and methodical order. By constitutional provision, national and state, the jury is an integral portion of the machinery for administering justice. With some limitations, or rather with some additional provisions to secure a jury of experts in certain cases, it is probable that trial by jury will ever remain as among the most cherished of our rights. Chief Justice Taney says that this country will not long remain free after it shall consent to lose the trial by jury. Certain circumstances have operated to impair the professional popularity of trial by jury in civil cases. But these have largely resulted from the indifference of the judges, and their indulgence in excusing the best men from this service, or their failure to see that the officers summoned only men of the highest character and intelligence. These defects are remediable, and they will in time work their own cure. But this is too large a field on which to enter in calling the attention of the profession to the present book.

The author has very properly united the history of the jury trial with a practical treatise on the subject, giving a digest of the more important cases which have been decided respecting the right to this mode of trial; the selection and return of the jury; the impaneling and oath; the incidents of the trial; the province and duty of the court and of the jury; the verdict; mode of impeachment of the verdict; the discharge of the jury, etc. The work is full of information, general and practical, and will be found a useful and satisfactory compilation of the law and learning pertaining to this interesting topic. D.

BUSH'S KENTUCKY REPORTS, VOL. XI.—Reports of Selected Civil and Criminal Cases, Decided in the Court of Appeals of Kentucky. By W. P. D. BUSH, Reporter. John P. Morton & Company: Louisville, Ky., 1876.

This is a book of seven hundred pages, exclusive of the index and table of cases, and contains over a hundred decisions of the Court of Appeals of Kentucky, delivered during the latter part of the winter term of 1874, the summer term of 1875, and part of the January term of 1876. The reports of this state have now reached the seventy-fourth volume, and the reporters, dates, and number of volumes, are as follows: Hughes, 1795–1801, one volume; Sneed, 1801–1805, one volume; Hardin, 1805–1808, one volume; Bibb, 1808–1817, four volumes; A. K. Marshall, 1817–1821, three volumes; Littell, 1822–1824, six volumes; T. B. Monroe, 1824–1828, seven volumes; J. J. Marshall, 1829–1832, seven volumes; Dana, 1833–1840, nine volumes; Ben. Monroe, 1840–1858, eighteen volumes; Metcalfe, 1859–1863, four volumes; Duvall, 1864–1866, two volumes; Bush, 1866—1876, eleven volumes. The present volume contains only selected cases; the practice in this state being to publish only decisions of interest and importance; a practice which we heartily favor, and hope to see adopted everywhere. The syllabi are well-written and comprehensive, and the authorities cited by counsel are given a conspicuous place. The printing and binding are good, and the general appearance of the work is excellent. Among the leading cases reported in this volume are the following:

PERSONAL INJURIES—EXCESSIVE DAMAGES.—*L. & N. R. R. Co.* v. *Fox*, p. 495.—Opinion by COFER, J. This case illustrates the disposition of jurors to find heavy verdicts against railroad corporations. The plaintiff was a passenger on the defendant's road when an accident occurred, and the train was thrown from the track and precipitated over an embankment. He was so badly crushed that, in order to save his life, it was found necessary to amputate one of his legs, the other being also badly hurt. His sufferings continued for a number of weeks, and entailed great pain and expense. He brought suit against the company, and the jury awarded him $35,000. The Court of Appeals reversed the verdict on the ground of excessive damages. No less than two hundred and seventy-five cases were cited by counsel in the argument, and the opinion of the court contains an interesting review of the cases in this country and England, where immense sums have been assessed by juries in similar cases. In L. & P. R. R. Co. v. Smith, the verdict was for $4,700. The plaintiff, who was an artist, had his right arm permanently disabled, and consequently suffered great loss in his profession. In L. & N. R. R. v. Collins, 2 Duvall, 14, the plaintiff, who was a laborer, lost both legs in consequence of being run over by one of defendant's locomotives, the verdict was for $5,000. In L. & N. R. R. v. Robinson, 4 Bush, 508, the plaintiff lost one leg in the same way and also received $5,000. In Sickling's case, 5 Bush, 1, a verdict for $10,000 was rendered, the plaintiff's arm having been broken in two places; but the court reversed it as being excessive. C. & W. W. R. R. Co. v. Jackson, 55 Ill. 492, was an action to recover for the loss of both legs, and the verdict was for $18,000. In Caldwell v. The N. J. Steamboat Co., 56 Barb. 426, the plaintiff was injured by the bursting of a boiler. For five months he was confined to his hotel in the City of New York, his board and the expenses of his cure being nearly $6,000; the jury gave him $20,000. Walker v. Erie R. R., 63 Barb. 260, was an action for an injury caused by an accident; the verdict in this case was for $20,000. In Boyce v. California Stage Co., 25 Cal. 460, the plaintiff sued to recover for injuries occasioned by the upsetting of one of the defendant's coaches. He was a laborer, and up to the time of the trial, more than a year and a half after the accident, he had been unable to perform any labor except with his left hand; the verdict was for $16,500. In Choppin v. New Orleans & Can. R. R. Co., 17 La. Ann. 19, the plaintiff recovered a verdict for $25,000, for a personal injury. In Barksdell v. the same defendant, a child five years old, recovered $15,000 for the loss of both legs. The largest verdict referred to was given in Fair v. L. & N. W. R. Co., an English case reported 21 L. T. 326, where a clergyman, who had received permanent injuries in a railway accident, was awarded $26,500. In Shaw v. B. & W. R. R., 8 Gray, 15, the case was tried three times. The first verdict was for $15,000, the second for $18,000, and the third for $22,500.

ALTERATION OF PROMISSORY NOTE AND SUBSEQUENT ERASURE.—*Locknane* v. *Emmerson*, p. 69.—Opinion by PETERS, C. J. If the words, "to bear legal interest," be in-

serted in a note by the payee, or by another, with his consent, after the surety has signed it, and without his knowledge or approval, he will be released, and a subsequent erasure of the words inserted will not restore the note to vitality so as to bind the surety. Citing Terry v. Hazlewood, 1 Duv. 104; U. S. v. Spalding, 2 Mason, 478.

PROMISE TO DEVISE AN ESTATE TO ANOTHER.—*McGuire* v. *McGuire*, p. 142. Opinion by PETERS, C. J. A father and son mutually agreed to, and did make wills, the son devising his estate equally to his brothers and sisters, after a life estate to the father and mother, and the father, in consideration thereof, devising his entire estate to his daughters, in order to make them equal with the sons, to whom he had made advancement. After the death of the son, and the probate of his will, the father, contrary to the agreement, conveyed the greater portion of his estate to one of his surviving sons, who had a great influence over him, and who had already received large advancements, and published another will, revoking the former and devising to his daughters all his estate which he should own at his death. In a suit by the daughters to set aside these conveyances to the son, it was held that they were entitled to recover, and the conveyances were set aside. The court states, as a general rule, that where there is an absolute promise upon a valuable consideration by one party to bequeath or devise to another a certain and definite legacy or estate, compensation may be recovered for a breach of the contract or agreement. Citing Mason v. Mason, 3 Bush, 35; Smith v. Smith, 5 Bush, 625; Myles v. Myles, 6 Bush, 237; Redfield on Wills, 281-2; Cruise v. Christophers, Admr., 5 Dana, 181; James v. Langdon, 7 Ben. Mon. 193; Gore v. Sumersall, 5 Mon. 565.

PERJURY—AUTHORITY TO ADMINISTER OATH—*Biggerstaff* v. *Commonwealth*, p. 169.—Opinion by LINDSAY, J. 1. No oath, taken before those who take upon themselves to administer oaths of a public nature without legal authority, can ever amount to perjury. It is an essential prerequisite to the establishment of the guilt of one accused of the crime of perjury, that the oath should have been administered by a person authorized by law to administer an oath. 2. When an oath is administered in a regularly organized court, and it appears *prima facie* that the judge, magistrate, or officer before whom the oath was taken, was *de facto* in the ordinary exercise of his office, the burden is on the prisoner to show the want of proper legal authority; but this rule applies only to public functionaries, and where the authority to administer the oath is derived from a special commission, or where it is delegated to be exercised only under particular circumstances, the commission in the one case, or the existence of the essential circumstances in the other, must be distinctly proved.

BILL OF EXCHANGE—CERTAINTY OF AMOUNT—ATTORNEY'S FEE—USURY.—*Garr et al.* v. *Louisville Banking Co.*, p. 180.—Opinion by COFER, J. 1. An agreement endorsed on the back of a bill of exchange that, if the bill should be sued upon, a reasonable attorney-fee should be paid by the obligors to the holder, does not thereby make the amount due thereon uncertain, so as to deprive the paper of its negotiability. The court say: "In the cases cited, and others referred to by counsel, the amount to be paid at the maturity of the note or bill was uncertain, and it was that fact which destroyed their negotiability; but in this case the amount to be paid at maturity was fixed and certain, and it was only in the event that the bill was not paid when due that any uncertainty arose. The reason for the rule that the amount to be paid must be fixed and certain is, that the paper is to become a substitute for money, and this it can not be unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due, it ceases to have that peculiar quality denominated negotiability, or to perform the office of money; and hence, anything which only rendered its amount uncertain after it has ceased to be a substitute for money, but which in no wise affected it until after it had performed its office, can not prevent its becoming negotiable paper. Until the paper in question matured, the amount due upon it was fixed and certain, and it might, therefore, take the place of money; when it became overdue, that fact put an end to its career, and then for the first time the amount to which the holder was entitled became uncertain, or, rather, might be made uncertain by bringing an action on the bill against the parties who signed the agreement endorsed thereon." The Supreme Court of Missouri have recently held that an instrument containing a provision, in regard to an attorney's-fee, similar to the one in this case, is not a promissory note. See First Nat. Bk. of Trenton v. Gay, 3 Cent. L. J. 465, and cases there cited. 2. The court further hold that this provision is not usurious. When the debtor, by the terms of his contract, can avoid the payment of a larger, by paying a smaller sum at an earlier day, the contract is not usurious, but the difference between the two sums is a penalty. But where he can not discharge his contract according to its terms, at maturity, by the payment of the debt and lawful interest, the contract is usurious. Citing Cullen v. How, 8 Mass. 257; Moore v. Hilton, 1 Dev. Eq. 429; Jordan v. Lewis, 2 Stew. 436; Thomassen v. Townsend, 10 Bush, 114.

BIGAMY—PROOF OF MARRIAGE.—*Commonwealth* v. *Jackson*, p. 679. Opinion by COFER, J. In this case, the only evidence on the trial of the marriage of the defendant prior to that alleged to be polygamous, consisted of evidence of his declarations that another woman was his wife, and of the fact that he had lived with, recognized, introduced and represented her as his wife. The presiding judge was of opinion that an indictment for bigamy could not be maintained without proof of the fact of two marriages, either by record evidence or by the testimony of one or more witnesses, who were present at the solemnization of the marriage rites, and peremptorily instructed the jury to find the defendant not guilty. The case was brought to the Court of Appeals by the attorney-general, to obtain the opinion of the court upon the point decided adversely to the Commonwealth by the court below. The appellate court hold that, in prosecutions for bigamy, the marriage of the defendant may be established by proof of conduct, declarations, cohabitation, etc. This is a subject about which there is an irreconcilable conflict in the authorities. In Massachusetts, New York and Connecticut, and, perhaps, in some other states, it has been held, that an actual marriage of the prisoner must be proven, and that neither cohabitation, reputation, nor the confessions of the prisoner, are admissible for that purpose, or, if admissible, are not, of themselves, sufficient to warrant conviction. Com. v. Littlejohn, 15 Mass. 163; Roswell's case, 6 Conn. 446; People v. Humphrey, 7 Johns. 314. On the other hand, it has been held, in South Carolina, Virginia, Georgia, Alabama, Ohio, Pennsylvania, Maine and Illinois, that, in prosecutions for bigamy, the confessions of the prisoner, deliberately made, are admissible as evidence to prove marriage in fact; and, in some of those states, that such confessions are, of themselves, sufficient to authorize the jury to convict. Britton's case, 4 McCord, 256; State v. Hilton, 3 Richard, 434; Warner v. Com., 2 Virginia cases, 95; Cook v. State, 11 Ga. 53; Cameron v. State, 14 Ala. 546; Woolverton v. State, 16 Ohio, 173; Murtagh's case, 1 Ashmead, 272; Forney v. Hallacher, 8 Serg. & Rawle, 159; Cayford's case, 7 Greenl. 57; Harris' case, 11 Me. 391; State v. Hodgkins, 19 Me. 155; Jackson v. People, 2 Scam. 231. The American cases, in which it has been held that evidence of such declarations, confessions and conduct is not admissible, or, if admissible, is not, of itself, sufficient to warrant conviction, seem to rest on the authority of Morris v. Miller, Burr. 2056, and Birt v. Barlow, Doug. 171. But that Lord Mansfield, who delivered the judgments in these cases, did not mean to decide that a marriage in fact could not be proved by evidence of the declarations and conduct of the prisoner, is not only clear from the cases in which he has been supposed to have made that decision, but is further shown by his decisions in Mary Norwood's case, 1 East, Cr. Law, 337, where he, with the concurrence of Parker, C. J., and Smythe, Bathurst and Parrot, J.J., determined that seven years' cohabitation, and several admissions by the prisoner that a person was her husband, by calling him by that appellation, was not only competent, but sufficient evidence to prove a marriage in fact. See also 2 Phillips on Ev. 210; Truman's case, 1 East, 470; 2 Greenl. on Ev. § 49; 3 ib. § 204; Chitty Crim. Law, 472; Regina v. Upton, 1 Car. & Kir. 155. "It is difficult," says the learned judge who delivered the opinion of the court, "to perceive any reason for discriminating between admissions to prove a marriage, and other facts essential to constitute the legal guilt of the accused; there can be no more danger of doing injustice in receiving such evidence in the class of cases under consideration than in any other. Where the declarations of the prisoner, and the fact that he has recognized and cohabited with the woman alleged to be his wife, are alone relied upon, the jury should still be told that this is only evidence tending to prove an actual marriage, and that it is for them to de-

cide whether the facts proven are sufficient to warrant them in finding that the prisoner was, in fact, married to the alleged wife, and, unless they so believe, they should acquit; although they may believe he recognized and cohabited with her as his wife. This will place the declarations of one indicted for a crime, in which proof of actual marriage is necessary to make out his guilt, upon the same legal footing with those charged with other crimes, and will not give comparative immunity to this crime by obstructing the path of the prosecutor with a rule of evidence which, it is believed, would render conviction impossible in a large majority of such cases where the moral evidence of guilt is conclusive, and where a conviction could be had by simply applying to that class of cases the same rules of evidence applied to other crimes, subjecting the offender to like punishment."

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

October Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

PRACTICE IN COURT OF APPEALS—DIMINUTION OF RECORD.—There being no question of law presented by the record, and a suggestion of diminution of the record being made in this court, and application for *certiorari* to perfect the record, two months after the time prescribed by law for assigning errors have elapsed, and, after the case is reached for hearing, the application is overruled and the judgment of the Circuit Court affirmed. Opinion by BAKEWELL, J.—*Clamorgan et al. v. Walter.*

PRACTICE IN CRIMINAL CASES—STAY OF EXECUTION—INDICTMENT FOR AN OFFENSE IN SEVERAL COUNTS—QUALIFIED JURORS.—An application for an order directing that the writ of error in this case shall operate as a stay of proceedings on the judgment, will not be granted unless inspection of the record shows probable cause for appeal. An indictment in three counts, charging murder in the first degree: 1. by blows, 2. by stabbing, 3. by drowning, when they charge one offense, is not demurrable; nor can the prosecuting attorney be compelled to elect upon which of the three counts he will proceed. [Citing State v. Pitts, 58 Mo. 556; Miller v. State, 25 Wis. 386]. The qualified jurors required to be summoned by the sheriff (Wag. Stat. pp. 1101-2, §§ 7, 8), are such as are generally qualified to serve on the jury within the county, and not such as are qualified to sit in the particular case. In summoning jurors from the by-standers after the regular panel is exhausted, there is no law requiring any particular number to be so summoned, and none requiring a list of them to be furnished to defendant. Application for stay of proceedings denied. Opinion by BAKEWELL, J.—*State v. Price.*

CIVIL PRACTICE—DEMURRER TO EVIDENCE—NEGLIGENCE—FACTS TO BE PROVEN BY PLAINTIFF.—In an action to recover damages for injuries alleged to have been inflicted through the negligent acts of defendant, or his agents, in charge of defendant's horses and wagon, where plaintiff fails to show that they were the property of defendant, or to connect defendant or his agents with the injury inflicted, or to introduce evidence tending to prove that the act by which plaintiff was injured was negligent, a demurrer to the evidence should be sustained. [Citing Weldon v. Harlem R. R. Co., 5 Bosw. 576; McCahill v. Kipp, 2 E. D. Smith, 413: McBroom v. Putney, 28 Ind. 353; Holman v. C. R. I. & P. R. R., 62 Mo. 562]. Though it is true that negligence may be inferred from the circumstances, the fact must be proved. There can not be a complete gap in the evidence wide enough to let in possibilities consistent with perfect diligence on the part of defendant. When it appears equally probable that either of two causes might have produced the injury, one of which is attributable to negligence of defendant, the court would hold that there was no connection between the injury and defendant's negligence. Judgment of general term, reversing judgment of special term, affirmed. Opinion by HAYDEN, J.—*Schmidt v. Harkness.*

EVIDENCE—EXPLANATION OF AMBIGUOUS CONTRACT—AGENCY—RATIFICATION—SEAL.—Where a written contract, entered into by an agent, is ambiguous in its terms, speaks in two voices, some of its provisions tending to show that it is a transaction of the agent's principal, though it is merely executed by the agent in his own name, it is competent to go to the jury, together with evidence offered of its ambiguities. Testimony was competent in such case, to show that the person executing the contract, did so in the exercise of delegated powers and within their limits. [Citing, Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326; Smith v. Alexander, 31 Mo. 193; Musser v. Johnson, 42 Mo. 74; McClelland v. Reynolds, 49 Mo. 312; Wash. M. F. Ins. Co. v. St. Mary's Seminary, 52 Mo. 480]. It was also competent to prove ratification of contract, without pleading ratification as such. Where seal is unnecessary, it may be rejected as surplussage. Judgment reversed and cause remanded. Opinion by HAYDEN, J.—*Collins v. Life Ass. of America.*

STATUTORY CERTIORARI—FORCIBLE ENTRY AND DETAINER—COMMON-LAW WRIT—LIABILITY OF MUNICIPAL CORPORATION.—The statutory *certiorari*, in cases of forcible entry and detainer, is authorized only before the rendition of judgment. The common-law writ could only apply where the justice had exceeded his jurisdiction, or where there was no other available remedy. Whether a municipal corporation can commit forcible entry and detainer or not, is not a jurisdictional question; but a defence upon the merits. A corporation is civilly liable for a trespass or tort, done, at its command, by its agents, in a matter within the scope of the purposes of the corporation, which would warrant a like action against an individual. [Citing Soulard v. City of St. Louis, 36 Mo. 546]. The special conditions of liability are a proper subject for proof on the trial. The city had the right of availed from the judgment of the justice; not having awarded itself of that right, it is too late to complain of the insufficiency of the remedy lost by its own *laches*. Judgment affirmed. Judge Hayden not sitting. Opinion by LEWIS, C. J.—*State ex rel. the City of St. Louis v. Raum.*

ACTION FOR SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—AMENDED PLEADING—ADMISSIONS—TRUSTEES' SALES.—Where the Statute of Frauds is set up in an amended answer to a petition for specific performance, the original answer is abandoned and the defendant is not bound by its allegations or omissions; nor can its admission of a parol contract be used in evidence against him, to take the case out of the statute. The rule was different under the English Chancery Practice in regard to the admissions of the answer. [Citing Cooth v. Jackson, 6 Vesey, Jr., 12; Moore v. Edwards, 4 Vesey, Jr., 23; Story's Eq. § 756]. But under our practice there is no distinction between pleadings at law and in equity. The office of the answer is different from that of an answer in chancery, and is only intended to make up the issues to be tried. The amended answer covers the entire ground. [Citing Brown v. Feeters, 7 Wend. 301; Eliz. Manuf. Co. v. Campbell, 13 Abb. Pr. 87; Ames v. Hurlburt, 17 How. Pr. 185]. At a trustee's sale the trustee must be present to render the sale valid. Constructive presence will not be sufficient. [Citing Graham v. King, 50 Mo. 22; Vail v. Jacobs, 62 Mo. 130.] Judgment affirmed. Opinion by HAYDEN, J.—*Breckenkamp v. Rees et al.*

NOTES.

AMONG the benchand bar, the list of deaths during the past year, both in this country and abroad, is unusually large. It comprises the names of Chief Justice Nicholson, of the Supreme Court of Tennessee; Chief Justice Lowrie, formerly of the Supreme Court of Pennsylvania; Chief Justice Gilpin, of Delaware; Chief Justice Fisher, of Mississippi; ex-Chancellor Green, of New Jersey; Justice Thomas J. Judge, of the Supreme Court of Alabama; Justice I. L. Harris, of the Supreme Court of Georgia; Chief Justice Monell, of the Superior Court of New York; Justice Boulden, of the Supreme Court of Virginia; Judge Vories, of the Supreme Court of Missouri; Judge Lynd, of the Court of Common Pleas of Philadelphia; Judge Warren, of the Supreme Court of North Carolina, and Judge Redfield. Among the prominent lawyers of the land who have "gone over to the majority," are Reverdy Johnson, the great constitutional lawyer, of Maryland; Henry A. Wise, of Virginia; Robert Barnwell Rhett, of South Carolina; Michael C. Kerr, Speaker of the House of Representatives; A. T. Caperton, United States Senator from West Virginia; H. H.

Starkweather, member of Congress from Connecticut; Edward Young Parsons, member of Congress from Kentucky; ex-Senator George E. Pugh, of Ohio; ex-Governor John H. Clifford, of Massachusetts; ex-Governor Thomas, of Maryland, and ex-Governor Dixon, of Kentucky; Nathan Howard, the reporter; John L. Shoemaker, of Philadelphia, and ex-Governor Polk of Missouri. Abroad, the list is headed by John Taylor Coleridge, of the Court of Queen's Bench, after whom followed Sir T. D. Archbold and Sir John Quain, of the same court; Sir John Stuart, a noted Vice-Chancelor; and Chief Justice Hanson, of South Australia; Judge Mondelet, of Lower Canada; John Hillyard Cameron, the leader of the Canadian bar; Sir Bryan Edwards, formerly Chief Justice of Jamaica; Augustus Le Messurier, formerly Advocate-General of Bombay, and Chief Justice Whiteside, of Ireland.

A CORRESPONDENT in New York City writes: "Don't hurry the index to the last volume of the JOURNAL; but make it as complete and thorough as possible." That is just what we are doing. The index, which is now nearly printed, makes about fifty of those large quarto pages, set in solid brevier. It is, by far, the most thorough and comprehensive index which we have ever furnished; and, we have no doubt that, when it reaches our last year's subscribers, they will feel themselves amply compensated for the delay.

LAST week, in the Circuit Court of the United States for the Eastern District of Missouri, his honor, Judge Treat, made some wholesome remarks upon the impolicy of permitting attorneys to become sureties for their clients upon bonds given in the course of judicial proceedings. A very respectable and responsible attorney had signed a bond given by a foreign insurance company for a supersedeas in a case in which a writ of error had been sued out to take the case to the Supreme Court of the United States. The judge said, the rule which prohibited attorneys from being received on bonds by their clients, would be enforced under all circumstances.

THE RIGHT OF PROPERTY IN A BRIEF.—General Francis C. Barlow was a gallant soldier in the late war, and filled with ability the office of Attorney-General of New York; but, if reports be true, he has lately been eating of the insane root that takes the reason prisoner. He perpetrated, the other day, a "joke" on a brother attorney named Root, of so serious a character that a few more such jokes would inevitably consign the joker either to a lunatic asylum or to the undertaker. He and Mr. Root were opposing counsel before a referee, and, according to the usual courtesy, each sent the other a copy of his brief. Mr. Root, understanding the custom in such cases to be that the brief is retained by the counsel to whom it is sent, wrote his own comments and counter-arguments all along the margin of General Barlow's brief. But the General did not so understand the custom, and requested the return of his brief—a request with which Mr. Root could not, of course, comply; for this would disclose to the opposing counsel the true inwardness of his whole case. An explanation of this did not satisfy the General, who sent a note demanding the brief forthwith, and threatening a suit of replevin. To this Mr. Root responded in writing, giving his opponent this advice—as wise as the proverbs of Solomon, but less eloquent: "Don't make a d—d fool of yourself." "General Barlow's answer," according to the New York Tribune, "was a long letter, the animus of which was apology or no quarter. The letter contained a draft of an apology to Mr. Barlow, which Mr. Root was to sign and return. Refusing this, he was to accept the alternative of accepting a challenge to fight a duel in Canada. If he refused this also, General Barlow suggested that they might fire on the first occasion of their meeting on the street. General Barlow advised Mr. Root to arm, as he would need to protect himself. If they should not meet on the street before January 6, the time set for the next appearance before the referee, or if Mr. Root preferred it to a street encounter, then he recommended, in substance, that they have it out in dead earnest in the referee's office, and that Mr. Stanley be advised, so that he might be conveniently absent." Mr. Root became alarmed and consulted friends, who called upon General Barlow, who declared that it was all a "joke;" and the General has been laughing ever since to convince the prying public that it was a joke. Moral, number one: Do not scribble upon the margin of your opponent's brief. Moral, number two: Do not joke in such a serious way; it may necessitate an amount of subsequent laughter hazardous to the health.

HOW THE MARE WAS LOST—"ANE SATYRE."—BY SIR DAVID LYNDESAY:—

Marie![1] I lent my gossip[2] my mear to feth hame collis;[3]
And he her drownit[4] into the querrell[5] hollis.
And I ran to the Consistory for to pleinzie,[6]
And thair I happenit[7] amang ane gredie menzie;
They gave me first ane thing they call *citandum;*[8]
Within aucht[9] days I gat bot *libellandum;*[10]
Within ane month I gat *ad opponendum;*[11]
In half ane yeir I gat *interloquendum;*[12]
And syne, I gat—how call ze it?—*ad replicandum;*[13]
Bot I could never *ane word* zit understand him,
And than they gart me cast out many plackies,[14]
And gart me pay for four and twentie acties;[15]
Bot or thay came half gait to *concludendum,*[16]
The feind[17] ane plack was left for to defend him.
Thus they postponit me twa[18] zeir, with their traine,[19]
Syne,[20] *hodie ad octo* bad me cum againe;
And than the ruiks[21] thay roupit[22] wonder fast
For sentence[23] silver; thay cryit, at the last.
Of *pronunciandum*[24] they maid me wonder faine;[25]
But I gat never my gude[26] gray meir[27] againe.

D. E. P.

1. Virgin Mary, an exclamation. 2. Neighbor. 3. Coals. 4. Drowned. 5. Coal holes. 6. To complain or sue. 7. Happened among a lot of greedy men. 8. Original process, citation. 9. Eight days. 10. Complaint, declaration. 11. Opposition. 12. Plea, answer. 13. Replication. 14. Pieces of money. 15. Interlocutory movements. 16. Conclusion. 17. One piece of money. 18. Two years. 19. Prolix proceedings. 20. Think it means eight days from to-day, bad me, &c. 21. Birds of prey. 22. To cry out. 23. Money to pay fees of court. 24. Rendition of judgment. 25. Glad, content to receive it. 26. Good. 27. Mare.

A GREAT DEAL has been said about prolixity in pleading in equity cases, under the rules which obtained in former years; but we doubt if anything can be found which, for "linked sweetness long drawn out," eclipses the bill filed in the Circuit Court of St. Louis County, Missouri, in the case of Schultz v. The Columbia Life Insurance Company. That case, among several others of a similar character, was taken up for argument on demurrers, on Saturday last, before his Honor, Judge Thayer. The graphic reporter of the Globe-Democrat, describes the lively and fascinating discussion as follows: "Judge Clover, counsel for the Columbia, called for the papers, and dealt out seven different demurrers on the table. Then he took up the original Schultz petition and said he was going to read it through, at which bets were at once made as to how long it would take him, with side-bets as to the prospects of his surviving the task. He commenced at 2:01, reading about 140 words to the minute, with occasional spurts at 240 or thereabouts, so that the official short-hand reporter sent a boy out for an extra cord of note books and another gold pen. Twice he stopped to comment, and nine times did Judge Clover correct his reading. Gradually he got slower and slower, and at four minutes and thirty-nine seconds past 3 the last syllable had been read, and the manuscript was gracefully laid on the table."

THE STATUS OF JOURNALISTS UNDER STATUTE AS TO SERVANTS AND LABORERS.—In the New York Supreme Court, in a late suit brought by parties formerly occupying the positions of city editors and reporters on a suspended newspaper, a demurrer was interposed on the ground that only servants, laborers and apprentices were described in the act under which the action was brought. The Court affirmed the judgment rendered below in favor of the plaintiff, Van Vorst, J., saying: "The services of a reporter for a newspaper are commonly well understood, as is the meaning of the word. His duties, in reporting proceedings of courts, public meetings, legislative assemblies, and other services of a kindred character, are often laborious in the extreme, as they are responsible. His duties do not terminate with the day, but often extend in the night also. He must needs employ not only his hands continually, but his eyes, his ears and his brain also. The nature of his services to his employer depends upon his fidelity to his work and the accuracy of his reports. Within the meaning of the section in question, he is truly a laborer for, and a servant to his employer, and is entitled to recover of the stockholders for his services in reporting for the newspaper, the success of which depends greatly upon his labors. * * * An editor, "city," or assistant employed, and whose services it is to prepare, revise and correct a newspaper or a department thereof for publication, is within the same term and is entitled to redress against the stockholders of the corporation employing him for this work."